(13)

No. 96-79-CFX Title: Sandra Jean Dale Boggs, Petitioner
v.
Thomas F. Boggs, Harry M. Boggs and David B. Boggs

Docketed: July 16, 1996 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Jul 11 1996	Petition for writ of certiorari filed. (Response due August 15, 1996)
	Jul 11 1996	Appendix of petitioner filed.
	Aug 16 1996	Waiver of right of respondents Harry Boggs and David Boggs to respond filed.
	Aug 21 1996	DISTRIBUTED. September 30, 1996
	Sep 3 1996	Response requested.
	Oct 2 1996	Brief of respondents Harry Boggs and David Boggs in opposition filed.
	Oct 16 1996	REDISTRIBUTED. November 1, 1996
	Nov 1 1996	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 6, 1996. The brief of the respondents is to be filed with the Clerk and served upon opposing counsel on or before noon, Tuesday, December 31, 1996. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, January 10, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT January 15, 1997. **********
	Nov 29 1996	Record filed.
	Dec 3 1996	Joint appendix filed.
	Dec 3 1996	Brief of petitioner Sandra Jean Dale Boggs filed.
	Dec 5 1996	Brief amicus curiae of American Association of Retired Persons filed.
	Dec 6 1996	Brief amicus curiae of Employers Council on Flexible Compensation filed.
	Dec 6 1996	Brief amicus curiae of United States filed.
	Dec 9 1996	Record filed.
	Dec 10 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Dec 16 1996	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Dec 16 1996	CIRCULATED.
	Dec 30 1996	Motion of Estate Planning Probate Law Sect. of State Bar of California for leave to file a brief as amicus curiae filed.
	Dec 31 1996	Brief of respondents Harry M. Boggs and David B. Boggs filed.
	Dec 31 1996	Brief amicus curiae of Louisiana filed.
	Jan 10 1997	Reply brief of petitioner Sandra Jean Dale Boggs filed.
	Jan 15 1997	ARGUED.

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NO.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM 1996

SANDRA JEAN DALE BOGGS,
Petitioner

VERSUS

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., preempts states' community property laws that afford an inheritance right, to heirs of a predeceased non-employee spouse of the pension plan participant, to recover ERISA covered pension plan benefits from the participant's estate and surviving spouse.

II.

Does ERISA preemption of states' laws extend to pension benefits 'rolled over' into an Individual Retirement Account under 26 U.S.C. 401, et seq.?

LIST OF PARTIES

The parties to this case are the petitioner, Sandra Jean Dale Boggs and respondents, Thomas F. Boggs, Harry M. Boggs and David B. Boggs.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Sandra Jean Dale Boggs ("Sandra"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above action on April 17, 1996.

*

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 82 F.3d 90 (5th Cir. 1996) and is reprinted in the Appendix ("App.") of this certiorari petition at App. 13-25. The opinion of the United States District Court for the Eastern District of Louisiana denying petitioner's Motion for Declaratory Judgment is reported at 849 F.Supp. 462 (E.D.La. 1994) and is reprinted at App. 1-12.

*

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on April 17, 1996. This Petition for a Writ of Certiorari has been filed with the clerk of this Court within 90 days of the entry of that judgment. This Court has jurisdiction under 28 U.S.C. sec 1254 (1).

*

STATUTES INVOLVED

The relevant federal statutory provisions are:

Employee Retirement Income Security Act of 1974 ("ERISA"): § 514(a), (29 U.S.C. §1144(a)), §205 (29 U.S.C. §1055, §206(d)(1)(29 U.S.C. §1056(d)(1)), 29 U.S.C. §1132(a)(1), 29 U.S.C. §1132(e)(1), and

Internal Revenue Code, 26 U.S.C. §408 (Individual Retirement Account), the pertinent parts of which are reproduced in the Appendix hereto.

The relevant Louisiana statutory provisions are Louisiana Civil Code, Articles 538, 890, 2336, 2338, 2341, 2349, and 890, which are reproduced in the Appendix hereto.

*

STATEMENT OF THE CASE

Petitioner, Sandra Boggs ("Sandra") is the widow of Isaac Boggs ("Isaac"), an employee of South Central Bell. As an employee he participated in an ERISA-qualified pension plan. Isaac was married twice, first to Dorothy Boggs ("Dorothy"), who died in 1979, they being the parents of three sons, David Boggs, Thomas Boggs and Harry Boggs, the respondents herein, and second, to petitioner, Sandra. Isaac died in 1989.

In 1985 Isaac retired and became entitled to ERISA pension benefits. Upon his retirement, Isaac received a lump sum pension payment which he rolled over into an IRA account,

and a monthly annuity which was converted into a survivors annuity upon his death and is currently paid to petitioner, Sandra.

Dorothy, Isaac's first wife, who died in 1979, bequeathed by testament one-third of her estate and a lifetime usufruct in the remaining two-thirds to her surviving husband, Isaac. She also bequeathed the naked ownership, or reversionary interest, in the two-thirds of the estate subject to the usufruct to her three sons, respondents herein. Listed as one of the assets in Dorothy's estate as community property was an interest in Isaac's pension plan.

Two of the Boggs' sons filed an action in Louisiana state court seeking an accounting of their father's usufruct and an award of their deceased mother's community portion of the pension plan benefits.

Sandra then filed this action in federal court, under 29 U.S.C. § 1132(a)(1), and (e)(1), against the three Boggs' sons, seeking a declaratory judgment that: (a) the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under the plan and the IRA, (b) the community existing between Isaac and his first wife, Dorothy, had no interest in the assets or benefits payable under the pension plan or the IRA, and thus, (c) the three Boggs sons as testamentary heirs of their mother, Dorothy, and as forced heirs of their father, Isaac, have no interest in plan assets, or benefits, nor do they have a claim against petitoner, Sandra, individually or as executrix of the Succession of Isaac Boggs, for any portion of the value of such plan assets or benefits.

The district court held that ERISA does not preempt Louisiana's community property law: "Application of Louisiana's community property law in this case will not do major damage to any federal interest, and thus, the Supremacy Clause does not require that the state law be overridden." *Boggs v. Boggs,* 849 F.Supp. 462, 466 (E.D. La. 1994).

The Fifth Circuit affirmed the district court, holding that: "The broad sweep of the ERISA preemption provision, however, is not without limits *** it preempts only state laws which relate to a benefit plan." (82 F.3d at p.95) It found that when the state law " 'involves an exercise of traditional state authority' ", there is no preemption because the " 'area of domestic relations has long been the domain of the states'." (82 F.3d at pp. 95,96) It then reasoned that:

> "Under Louisiana community property law, each spouse owns 'a present undivided one-half interest' in all community asssets, which vest from the moment of acquisition. Pension benefits, if acquired during the marriage, are generally considered a community asset. Thus, if one spouse receives benefits from a pension plan, he or she must account to the other spouse for this benefit which vests equally in both spouses from the instant of acquisition." (Citing Hare v. Hodgins, 586 So.2d 118, 122 (La. 1991) (83 F.3d at p. 96).

The court rejected petitioner's contention that ERISA preempts the community property system by holding that such laws do not sufficiently relate to ERISA to trigger preemption, because state property laws only affect what the beneficiary does with the benefits "after they are received". (82 F.3d at p. 96) It rejected petitioner's reliance on ERISA's

spendthrift provision which prohibits the assignment or alienation of plan benefits (29 U.S.C. §1056(d)(1)). The court stated that provision is designed to prevent plan participants from "recklessly divesting themselves of plan benefits before retirement" (82 F.3d at p.97) and does not prevent the recognition of third party claims based on state community property laws under which "ownership vests immediately in the non-earning spouse and no transaction is needed to convey ownership". (82 F.3d at p.97) Consequently, the Fifth Circuit concluded:

> "Dorothy Boggs held an ownership right in the pension. Her spouse, or his estate, owes her an obligation to account for her share of the pension. Once her estate received this benefit, her will operates to transfer ownership to her three sons." (82 F.3d at p. 97)

The Fifth Circuit specifically rejected the contrary decision in *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991), wherein the Ninth Circuit held that California's community property law *is* preempted by ERISA. The Fifth Circuit said:

> "The plaintiff asks this Court to adopt the reasoning of the *Albamis* court and hold that ERISA preempts Louisiana community property law. We cannot adopt the reasoning of the Ninth Circuit Court because we feel their preemption analysis placed too much emphasis on a broad interpretation of the spendthrift provision." (82 F.3d at p. 98)

As regards the portion of Isaac's pension plan benefits

which were rolled over into an IRA, the Fifth Circuit found that 26 U.S.C. 408, governing IRA's, only "governs the trust relationship between the government and the participant,***" and "*** does not affect that participant's later obligation to his spouse to account for her portion of the pension benefits," (82 F.3d at p.98). Thus the court ruled:

> "This provision governing the disbursement of IRA funds cannot reasonable be interpreted to intervene in the marital relationship and divest one spouse of ownership rights." (82 F.3d at p.98)

As a result of the Fifth Circuit's rejection of Sandra's position, the Boggs' sons may proceed with their state court action in which they have sought (1) an accounting from Sandra of all of the pension payments paid during the lifetime of the employee, Isaac,[1] (2) an accounting of Dorothy's and Isaac's community interest in the survivor annuity payments which have been paid to petitioner, Sandra, since the death of Isaac,[2] and, (3) Dorothy's community interest in the lump sum distribution paid to Isaac upon his retirement[3], which lump sum distribution was "rolled over" into an Individual Retirement Account (IRA) prior to Isaac's death.[4]

REASONS FOR GRANTING WRIT OF CERTIORARI

Millions of American workers are participants in

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[1] La. Civil Code, Art. 890 and Art. 890.1, App. P. A-32

[2] La. Civil Code, Art. 2369, App. P. A-34

[3] Louisiana Civil Code, Articles 2336 and 2338. App. A-33

[4] *Succession of Egan*, 543 So.2d 940 (La. App. 5 Cir. 1989)

private pension plans earned while working in one or several of the states; these pension plans are designed to provide a measure of financial security for the participant's retirement years and are, thus, subject to federal regulation under ERISA. The stated purpose of ERISA is the uniform administration of all pension plans covered by the Act. In order to ensure the consistent and uniform application of ERISA's terms, Congress provided for "preemption of all state laws" that relate to ERISA covered plans and prohibited assignment or alienation of the participant's pension benefits. If the purpose of ERISA is to provide uniform administration of pension plans and uniform distribution of plan benefits, recognition of claims to those benefits based on any law other than ERISA defeats the twin purposes of uniformity and security that participants and annuitants expect and anticipate, as well as the certainty administrators require in determining who will be entitled to benefits.

In the Fifth Circuit, however, ERISA protected pension plans are preempted by states' community property laws which vest ownership to a portion of the plan assets in the non-employed spouse, thus affording her the right to dispose of her share by testament to third parties.

On the other hand, in the Ninth Circuit: "Permitting a non-employee spouse to bequeath one-half of a surviving employee's pension benefits to a third party would do 'major damage'***." (937 F.2d at pp. 1459-1460) That court correctly recognized that ERISA does preempt states' community property laws.

The United States Department of Labor, at the invitation of the Fifth Circuit, filed a brief as *amicus curiae* in the

appellate court in which it wrote a detailed and comprehensive analysis of the relationship between the preemption and anti-alienation clauses and their application to this case. Although the court rejected the United States' argument, the dissent of Judge King praised the United States' analysis as the preferred approach to the case and referred to an advisory opinion letter from the U. S. Department of Labor, which we have reproduced as App. P. A-35.

1. Conflict Exists Within the Circuits on the Breadth of the Pre-emption and Spendthrift Clauses of ERISA.

There is a direct conflict between the decision of the Fifth Circuit in this case and the Ninth Circuit decision in *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir. 1991). That conflict concerns an important question of national significance: Does the preemption clause of ERISA (29 U.S.C. sec. 1144(a), preempt state community property and inheritance laws that enforce rights of the heirs of the predeceased non-employee spouse against the estate of the participant and the participant's surviving spouse, or are such participant's pension benefits and the participant's surviving spouse's annuity protectd by ERISA from such claims?

In the Ninth Circuit, the participant's pension benefits are not subject to community property claims by the non-participant spouse's heirs, nor testamentary disposition by the non-participant spouse, whereas in the Fifth Circuit, the participant's pension benefits are subject to community property claims by the non-participant spouse's heirs, and testamentary disposition by the non-participant spouse. Unless this Court resolves this conflict, participants in ERISA

covered pension plans, and their spouses, will be faced with uncertainty and conflicting results depending upon the participant's domicile. Moreover, because many workers move from state to state during their working careers, it is essential that one law apply to pension benefits, rather than the many different states' laws. Thus, this split between the Circuits creates a significant and substantial national problem concerning the application of ERISA.

(a.) The Ninth Circuit's result is preferable to that of the Fifth Circuit.

In *Ablamis* the court did not consider the application of community property law to the pension benefits, because ERISA prevents the application of any state law that attempts to alienate the pension benefits. Therefore, the Ninth Circuit reasoned that the recognition and enforcement of testamentary claims by the heirs of the non-paticipant spouse constitute an impermissible alienation of the participant's benefits. The Ninth Circuit never decided the point whether or not the pension benefit fell into the community. Rather, the court focused on ERISA's non-alienation provision and concluded that "To the extent that state community property laws permit such transfers, they are preempted by section 1056(d) *** there is no reason to allow a predeceased non-employee spouse to leave part of her surviving employee spouse's pension to a friend, lover or relative." (937 F.2d at p. 1457). The court went on to say: "Congress intended to prohibit non-employee spouses from making such bequests." (937 F.2d at p.1458).

The Fifth Circuit, however, avoided direct confrontation with ERISA's anti-alienation provisions by finding that

community property laws create a *present vested ownership interest*[5] in the non-participant spouse in the employee's pension benefits which can be devised by testament to persons other than ERISA named beneficiaries. Thus, that court holds that such disposition of the benefits is a disposition of community property[6], rather than a dispositon of plan benefits, and therefore, does not 'relate to' the pension plan, because the Fifth Circuit reasons that community property laws have taken the benefits out from under ERISA's protection and vested ownership equally in the spouses. Only the result reached by the Ninth Circuit will solve the dilemma created by the Fifth Circuit's championing states' property laws in preference to preemption and non-alienation requirements of ERISA.

(b) The Fifth Circuit's Decision Is Not Well Founded.

It is submitted that the Fifth Circuit was in error in holding that testamentary disposition of community property does not 'relate to' the ERISA pension plan. To the contrary, Louisiana state law *does* "relate to" ERISA covered pension plans, because it attempts to define rights in the same persons to the same property that ERISA covers. Louisiana Civil Code, Article 890 provides for a usufruct in favor of a surviving spouse of all former community property inherited by the children of the marriage, and Article 538 provides for the payment of the principal consumed by the usufructuary to the naked owners at the termination of the usufruct. In this case the respondents are seeking payment from Sandra of a sum of money representing that portion of the pension

[5] La. Civil Code, Article 2336, App. P. A-33, is the source of this holding.

[6] La. Civil Code, Article 2338, App. P. A-33, is the source of this holding.

plan benefits attributable to the community assets between Dorothy and Isaac. Section 205 of ERISA provides that qualified benefits *shall* be paid to the participant, or the participant's surviving spouse, except in cases where spousal consent has been obtained in the naming of a beneficiary or where a qualified domestic relations order provides for an alternate beneficiary. Because state laws change the classes of protected persons under §205 and §206, and accord rights of ownership to persons outside of the ERISA designated classes of protected persons, it is submitted that, as in *Ablamis*, the Louisiana community property law is preempted by ERISA under 29 U.S.C. 1144(a), and thus the decision of the Fifth Circuit is in error.

The Fifth Circuit stated that it would not find preemption of 'traditional' areas of domestic relations law, and further, the suit between the participant's surviving spouse and the heirs of the participant's deceased first spouse is too remote to relate to ERISA covered pension plans to justify preemption of the state law. It reasoned that Louisiana' community property laws constitute a traditional state concern so that they survive preemption if they do not do 'major damage' to an area of federal concern, and further, that they affect ERISA in too remote a fashion to be considered "relating to" an ERISA plan, because a judgment in favor of the heirs of the nonparticipant spouse against an annuitant or participant does not involve the administration of plans. The court sought to justify that conclusion by attempting to create a distinction between the "plans" and the "proceeds of the plan": "Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary. This is no greater effect than the state's garnishment laws. *Mackey*, 486 U.S. 825, 108 S.Ct.

2183, 100 L.Ed.2d 836 (1988)." (82 F.3d at p. 3228). It is submitted that separating the "plan" from the "proceeds" is a distinction without a difference which will not support the Fifth Circuit's conclusion. Moreover, the Fifth Circuit's reliance on *Mackey* is misplaced. Welfare benefits, considered in *Mackey*, were not protected by the spendthrift clause, as are pension benefits; the Georgia general garnishment law did not relate to an ERISA governed right because ERISA did not create the obligation sought to be enforced nor determine the amount of that obligation. The general garnishment law did not interfere with or change the employee's entitlement to the benefits in question, it only allowed the creditor to attach that portion of the matured benefit necesssary to satisfy the employees' obligation. The garnishment laws do not control the ownership of employee pension benefits, whereas the community property laws do.

Likewise, the Fifth Circuit's reliance on its prior decisions in *Hook v. Morrison Milling Company,* 38 F.3d 776 (5th Cir. 1994), *Rozzell v. Security Services, Inc.,* 38 F.3d 819 (5th Cir. 1994) and *Sommers Drug Stores v. Corrigan Enterprises, Inc.,* 793 F.2d 1456 (5th Cir. 1986), fails to support its holding, because these cases all deal with general state laws that do not rely on or relate to an ERISA created obligation. The state negligence or fiduciary law in each of these cases had no effect on the ERISA plan, and the violation of these laws by the employer did not alter the employee's relation to the ERISA plan.

II. The Fifth Circuit's Decision Is In Direct Conflict With Decisions Of This Court In Related Areas.

The Fifth Circuit's holding in this case is contrary to

a line of United States Supreme Court cases involving the conflict between federal law and community property laws. Among those cases are: *Wissner v. Wissner,* 338 U.S. 655 (1950) (militry life insurance program); *Free v. Bland,* 369 U. S. 663 (1962) (U.S. Savings Bonds survivorship provision); and *Hisquierdo v. Hisquierdo,* 439 U.S. 572 (1979) (railroad retirement benefits). In each of those cases, this Court held that, where Congress has provided a comprehensive system for a particular purpose, whether railroad workers retirement or military personnel retirement, or savings bonds sales, community property laws awarding a non-participant spouse rights in the federally controlled program will not be recognized, except where specifically allowed by statute.

If the respondents are allowed to pursue their accounting action against the beneficiary, petitioner herein, Louisiana community property law will award them an amount equivalent to their mother's community interest in the benefits earned during her marriage to Isaac. This award will be against the beneficiary, and not directly against the plan, which all parties agree is not subject to garnishment.

In each of the above cited cases, this Court has found that such an offsetting award or recognition of a community property interest in the employee's benefits would do 'major damage' to a federal purpose.

> "An offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. ***" *Hisquierdo v. Hisquierdo,* 439 U. S. at p. 588

According to *Hisquierdo, Free* and *Wissner,* granting the "offsetting award", for the monetary equivalent of a portion of the employee's pension benefits, deprives the plan participant or his beneficiary of the plan benefits and thwarts the federally created protection envisioned by Congress.

Petitioner further submits that the Fifth Circuit failed to complete the analysis of the case at bar based on the test outlined in *Free v. Bland,* 369 U.S. 663 (1962). In *Free* this Court would not accept the fiction that a state law based judgment of ownership is permissible to dispossess the named beneficiary of federally created rights in U.S. Savings Bonds. The claim in *Free* was the same as here, except that the object of the claim was U.S. Savings Bonds rather than pension plan benefits. Federal law designated the beneficiary and established the order in which the benefits passed from person to person. The Texas Supreme Court in *Free* applied Texas community property laws to circumvent the federal scheme by giving judgment to the heirs of the predeceased spouse of the bond owner against the named beneficiary. This Court struck down that decision and succinctly stated the test:

> "If the state can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the state has interfered directly with legitimate exercise of the power of the Federal Government to borrow money." (369 U. S. at p. 669)

In the instant case the Fifth Circuit has created a fiction that ignores the federally created rights of the participant and the participant's surviving spouse in favor of the

heirs of the nonparticipant spouse. This result is achieved through the 'simple expedient' of the state community property laws and should not be permitted by this Court.

The major federal purpose of ERISA is maintaining the employee's financial security through a guaranteed income stream during retirement, and income to the employee's surviving spouse, the petitioner herein. Although it is reasonable to assume that Congress anticipated that many state laws would escape preemption, Congress clearly anticipated that ERISA would preempt state laws relating to entitlement to the covered benefits.

III. The Fifth Circuit Erroneously Ignored the Provisions of ERISA's Preemption of State Laws As Applied to 26 U.S.C. 401 et seq. And the IRA Account.

In this case, Isaac rolled over the lump sum distribution from his ERISA covered pension plan into an IRA at the time of his retirement, and this Court should hold that the funds derived from the ERISA plan are not subject to state laws of ownership, for the same reasons the participant's annuity and the surviving spouse's annuity are not subject to state law. The Individual Retirement Account Act, 26 U.S.C. 408, specifically states that the IRA account is "for the exclusive benefit of the individual or his beneficiaries" (26 U.S.C. 408(a) and "shall be applied without regard to any community property laws" (Id., sec. (g))

CONCLUSION

The community property laws, and the marital property laws of the non-community property states, are the types of laws that Congress intended to preempt by ERISA in order to provide a uniform and certain pension benefit law.

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Dated: July 10, 1996, Mandeville, Louisiana.

Respectfully submitted,

OF COUNSEL:

F. Pierre Livaudais
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APPENDIX A

MINUTE ENTRY
McNAMARA, J.
MARCH 9, 1994

FILED
MAR 10 '94

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

SANDRA JEAN BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

This is a declaratory judgment action wherein Plaintiff seeks to have this court declare that ERISA, 29 U.S.C. § 1001 *et seq.* preempts Louisiana's community property laws. After Plaintiff filed her Motion for Summary Judgment, the parties informed the court that there were no genuine issues of material fact and that this entire matter should be tried on stipulated facts. Having carefully reviewed the stipulated facts, the arguments of counsel and the applicable law, the court renders the following decision.

I. *FACTS*

Issac Boggs, Jr. was married to his first wife, Dorothy McDonald Boggs, from the date of his employment with South Central Bell on June 18, 1949 until her death on August 14,

DATE OF ENTRY MAR 10 1994

1979. During their marriage, Isaac and Dorothy Boggs had three sons; Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, who are the Defendants in this case. Pursuant to Dorothy Boggs' will, Isaac Boggs, Jr. received one-third of her estate and the lifetime usufruct of the remaining two-thirds of the estate, whose naked ownership was inherited by Defendants. The Sworn Descriptive List of assets filed in Dorothy Boggs' succession included the Bell System Savings Plan for Salaried Employees with a value of $42,388.57 at the time of her death, with her one-half interest valued at $21,194.29.

Isaac Boggs, Jr. married Plaintiff, Sandra Boggs, on April 5, 1980, and no children were born of this marriage. Isaac Boggs, Jr. retired from South Central Bell after 36 years of service on September 1, 1995. Upon his retirement, Isaac Boggs, Jr. received $151,628.94 which was the distribution from the BellSouth Management Savings Plan (formerly called BellSouth Systems Savings Plan for Salaried Employees). The entirety of these funds were "rolled over" into an IRA account at Delaware Charter Guarantee Trust Company. Isaac Boggs, Jr. made no withdrawals from the IRA account prior to his death on February 16, 1989, at which time the IRA account was valued at $180,778.05. In addition to the distribution from the Savings Plan, Isaac Boggs, Jr. received monthly retirement payments from September 1, 1985, through the date of his death on February 16, 1989, in the amount of $1,777.67 per month. Thereafter, the survivor's lifetime annuity pension has been paid to Plaintiff, and she was the named beneficiary of the IRA plan.

Under the terms of the BellSouth ESOP, Isaac Boggs, Jr. acquired 96 shares of AT&T stock which were distributed

to him when he retired. In addition, the Plan included life insurance policies payable to Plaintiff as the named beneficiary. The BellSouth Management Savings Plan, the ESOP Plan, and all retirement benefits and employee benefit plans of South Central Bell are qualified plans subject to the provisions of The Employee Retirement Income Security Act of 1974 and the Retirement Equity Act of 1984, 29 U.S.C. § 1001, *et seq.* The IRA account at Delaware is a qualified Individual Retirement Account under IRC Section 401, *et* seq.

Two of the Defendants herein, Harry and David Boggs, have filed an action in state court claiming that they are entitled to the following:

1. An accounting of the usufruct enjoyed by Isaac Boggs, Jr. over that portion of the retirement payments attributable to Dorothy Boggs' community interest in the retirement plan and the payment of a percentage of the pension plan payments from September 1, 1985 through February 16, 1989;

2. A percentage of the survivors' annuity payable to Sandra Boggs from February of 1989 until her death;

3. A percentage of the IRA account which was created in the "roll over" of Isaac Boggs, Jr.'s distribution of the BellSouth Management Savings Plan, based on Dorothy Boggs' community interest in those funds; and

4. A portion of the ESOP shares of AT&T stock.

On December 17, 1992, Plaintiff filed her Complaint for

Declaratory Judgment seeking a ruling that ERISA preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under, the plan and/or the IRA.

II. *ANALYSIS*

Louisiana is in the minority of states that provide for a comunity property regime among spouses where "[e]ach spouses owns a present undivided one-half interest in the community property." La. Civ. Code Ann. art. 2336 (West 1994). Under Louisiana's community property regime, a non-employee spouse is granted a right to claim pension and survivorship benefits even if such do not become payable until after the community is dissolved as long as both the pension and the community coexist for some period of time. *T.L. James & Co. v. Montgomery,* 332 So.2d 834 (La. 1975) and *Sims v. Sims,* 358 So.2d 919 (La. 1978). The Court's reasoning in these two cases was that the future pension right, which was being built up during the existence of the community, constituted "an incorporeal, movable right" and had to be so classified at the dissolution of the community. *T.L. James & Co.,* 332 So.2d at 851. Under Louisiana law, therefore, Dorothy Boggs owned a substantial interest in the pension and retirement plans of Isaac Boggs, Jr. because she was married to him during thirty of the thirty-six years that he was employed with South Central Bell.

While Plaintiff does not refute that Louisiana's community property laws operate as described above, Plaintiff argues that ERISA preempts state community property law. Plaintiff's preemption argument relies upon a single provision of ERISA. Specifically, Plaintiff contends that section

514(a) of ERISA, 29 U.S.C. § 1144(a) (1976), explicitly preempts the state law at issue. Section 514(a) provides that ERISA "shall supersede any and all state laws insofar as they . . . relate to any employee benefit plan. . . ." After carefully considering the arguments of counsel and the applicable law, the court finds that ERISA does not preempt Louisiana's community property law.[1]

While there is no question that the Supremacy Clause gives Congress the power to preempt state laws, both Congress and the courts have traditionally deferred to state property law because of the strong state interest in determining the nature of property rights. *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979). The courts have, however, recognized that ERISA broadly preempts state law because Congress

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[1] Although Plaintiff did not argue that section 206(d) (1) of ERISA, 29 U.S.C. § 1056(d) (1) (1976), preempts Louisiana's community property law, this court, for purposes of completeness, will consider whether this section supersedes the state law at issue herein. Section 206(d) (1) provides that "[e]ach pension shall provide that benefits provided under the plan may not be assigned or alienated." This court finds, however, that there are two reasons why ERISA's anti-alienation provision does not operate to preempt Louisiana's community property law.

First, Congress proscribed alienation and assignment of pension benefits to protect an employee from his own financial improvidence in dealing with third parties, and Congress did not intend to alter traditional familial and support obligations. *Savings and Profit Sharing Fund of Sears Employees v. Gago,* 717 F.2d 1038, 1041 (7th Cir. 1983) (citing *American Telephone and Telegraph Co. v. Merry,* 592 F.2d 118, 124 (2nd Cir. 1979)). Secondly, "alienate" means "to convey or transfer to another (as title, property, or right): part voluntarily with ownership of." Webster's Third New International Dictionary (1981). By virtue of Louisiana's community property law, Dorothy Boggs' rights in the benefits were acquired by her directly at the outset and did not represent a transfer to her of rights which had previously accrued to Isaac Boggs, Jr. Thus, operation of community property law to the present pension benefits does not constitute an assignment or alienation prohibited by section 205(d) (1).

was primarily concerned with requiring all pension plans to operate under a uniform legal scheme and to eliminate the threat of conflicting state regulation. Note, *Ablamis v. Roper: Preemption of the Nonemployee Spouse's Community Property Rights in ERISA Pension Plans*, 49 Wash. & Lee L. Rev. 1085 (1992) (citing *FMC Corp. v. Holliday*, 111 S.Ct. 403, 408 (1990)). Despite its broad preemption provision, ERISA does not preempt state laws such as Louisiana's community property laws which were not specifically designed to affect ERISA benefit plans. While such state laws may indirectly implicate an ERISA pension plan, they do not "relate to" an employee benefit plan as required to trigger the preemption provisions of section 514(a). *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825, 829 (1988). Instead, ERISA will preempt Louisiana's community property law if and only if: (1) Congress has positively expressed its intent to preempt the state law and (2) the state law does major damage to a clear and substantial federal interest. *Hisquierdo*, 439 U.S. at 808.

Enforcement of Louisiana's community property law simply would not cause "major damage" to any "clear and substantial federal interest" served by ERISA. In enacting ERISA, Congress declared that its policy was the protection of employees vis a vis their employers. 29 U.S.C. § 1001. Not surprisingly, ERISA regulates funding, disclosure, and the vesting of rights in the plans. The Act does not display any particular interest in preserving maximum benefits to any particular beneficiary.

> Although the Act provides a method for the participant to designate a beneficiary, this procedure appears to be another provision for the protection

> of the employee in his relations with his employer and not a federal decision to upset the balance of spousal rights protected by state law.

Employees Savings Plan of Mobil Oil Corp. v. Greer, 535 F.Supp. 1052, 1055 (S.D. N.Y. 1982).

In two cases involving federal pensions, the Supreme Court found that the state domestic relations laws so conflicted with federal objectives that the state laws were preempted. For example, the Court held that state courts could not allocate military retirement pay pursuant to state community property laws upon dissolution of a marriage because such state laws conflicted with the federal military retirement scheme. *McCarty v. McCarty*, 453 U.S. 210 (1981). In *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1970), the Court held that pensions under the Railroad Retirement Act of 1974 were not community property subject to division upon dissolution of the marriage because such division would conflict with an allocation of a federal benefit intended by Congress.

These two cases, in which the Court found the requisite damage to federal interests to preempt state property law, differ substantially from the case at hand. In *McCarty*, the Court found that the federal statute providing retirement pay to military officers served major federal goals by providing for the needs of retired officers and by facilitating the management of military personnel by encouraging enlistment, reenlistment, and retirement at an appropriate age. Similarly, in *Hisquierdo*, the Court noted that the Railroad Retirement Act of 1974 created a system of federally administered benefits similar to Social Security. Under this Act, Congress "carefully targeted" the benefits to be provided, consciously

"fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire," and specifically limited the extent to which a divorced spouse may reach these assests. *Hisquierdo,* 439 U.S. at 584-85. Moreover, the present controversy involves privately funded pensions whereas both *McCarty* and *Hisquierdo* actually involved federally funded pensions.

Importantly, the Supeme Court suggested that the Railroad Retirement Act, found to preempt community property law, should be distinguished from ERISA:

> In [the Railroad Retirement Act], Congress has granted a separate spouse's benefit, and has terminated that benefit upon absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. *See* Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. § 1001 *et seq.* Our holding intimates no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics.

Id. at 591, n. 24. ERISA merely imposes standards on private administrators of private benefit plans. It does not evince any special concern for preserving all of the benefits of the plans for the participants. Application of Louisiana's community property law in this case will not do major damage to any federal interest, and thus, the Supremacy Clause does not require that the state law be overridden.

The result reached herein is also supported by the Supreme Court's dismissal, for want of a substantial federal question, of the appeal in *Carpenters Pension Trust Fund v. Campa,* 89 Cal. App. 3d 113 (1979), *appeal dismissed,* 444 U.S. 1028 (1980). The effect of a dismissal for want of a substantial federal question is to leave the decision of the lower court undisturbed and "without doubt [to] reject the specific challenges presented in the statement of jurisdiction." *Mandel v. Bradley,* 432 U.S. 173 (1977). *See also* 16 C. Wright, A. Miller, E. Cooper & E. Glessman, *Federal Practice and Procedure* § 4014 at 638-39 (1977).

In *Campa,* the state court held that ERISA did not preclude the states from dividing pension rights in marital dissolution proceedings. Significantly, the first question presented to the Supreme Court in *Campa* was:

> 1. Do the provisions of Title I of the Employment Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?

Brief of Appellant at 7. *See also Savings and Profit Sharing Fund of Sears Employees v. Gago,* 717 F.2d 1038, 1043 (7th Cir. 1983). Under the doctrine established in *Mardel v. Bradley,* therefore, the Supreme Court's dismissal of *Campa* for want of a substantial federal question serves as a decision on the merits that the preemption section of ERISA does not override California's community property law. Likewise, this court ascertains no reason why ERISA would premept Louisiana's community property law.

This court notes two additional reasons why ERISA should not preempt state community property law. First, Congress enacted the Retirement Equity Act of 1984 as an amendment to ERISA, in part, as a response to the judicial uncertainty of whether ERISA's bar to the transfer of plan benefits to third parties applied to the apportionment of benefits to a nonemployee spouse pursuant to a divorce settlement. As a result of this amendment, ERISA now specifically grants a divorced nonemployee spouse the right to receive and dispose of benefits awarded in a divorce proceeding but does not explicitly recognize state-created property rights in a married nonemployee spouse. Thus, finding that ERISA preempts state community property law would provide a strong incentive for a nonemployee spouse in a community property state to obtain a divorce before death as the only method of retaining transmissible property rights in the pension. Note, *Ablamis v. Roper: Preemption of the Nonemployee Spouse's Community Property Rights in ERISA Pension Plans,* 49 Wash. 8 Lee L.Rev. 1085 (1992). Secondly, because Louisiana law provided Dorothy Boggs with an undivided interest in the retirement plans at the time that the fund was established, which was well before ERISA was passed in 1974, allowing ERISA to preempt her state created property right would violate the Fifth Amendment's prohibition against the government's taking private property without just compensation. Based upon the foregoing reasons;

IT IS ORDERED that Plaintiff's Motion for Summary Judgment, which seeks a declaration that ERISA preempts Louisiana's community property laws, be and is hereby DENIED.

IT IS FURTHER ORDERED that Judgment be and

is hereby rendered in favor of Defendants, DECLARING that ERISA does not preempt Louisiana's community property laws.

* * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SANDRA JEAN BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

FILED
MAR 10 '94

JUDGMENT

For the reasons set out in this court's Minute Entry dated March 9, 1994;

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be entered herein in favor of Defendants, Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, and against Plaintiff, Sandra Jean Boggs, DECLARING that ERISA, 29 U.S.C. § 1001 *et seq.*, does not preempt Louisiana's community property law.

New Orleans, Louisiana, this 9th day of March, 1994.

/s/ Illegible
UNITED STATES DISTRICT JUDGE

DATE OF ENTRY MAR 10 1994

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-30178

FILED
APR 17 1996

SANDRA JEAN DALE BOGGS,
Plaintiff-Appellant,

VERSUS

THOMAS F. BOGGS, HARRY P. BOGGS
and DAVID B. BOGGS,
Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana

Before WISDOM, KING, and DUHE', Circuit Judges.

WISDOM, Circuit Judge.

Sandra Boggs, the plaintiff/appellant, seeks a declaratory judgment that the Employee Retirement Income Act of 1974 (ERISA) preempts Louisiana community property law and, thereby, prevents the creation of a community property interest in ERISA-qualified retirement benefit plans. The district court rejected the plaintiff's contention and

denied her request for a declaratory judgment. We agree with the district court's decision. We AFFIRM.

I.

Isaac Boggs was employed by South Central Bell from June 18, 1949 until his retirement on September 1, 1985. As an employee, he participated in an ERISA-qualified pension plan. Isaac Boggs was married to his first wife, Dorothy Boggs, when he began employment with South Central Bell in 1949 and their marriage continued until her death on August 14, 1979. Dorothy and Isaac Boggs had three sons, David Bruce Boggs, Thomas Frank Boggs, and Harry Maurice Boggs, the defendant/appellees. Isaac Boggs married again in April of 1980. His second wife, Sandra Boggs, the plaintiff/appellant, survived her husband who died in 1989.

The South Central Bell plan provided for several types of retirement benefits. Upon his retirement, Isaac Boggs received a lump sum payment of $151,628.94 which was rolled over into an IRA account valued at $180,778.05 at his death. He was also paid a monthly annuity of $1,777.67. This benefit was converted into a survivor's annuity when Isaac Boggs died and is currently paid to Sandra Boggs. Isaac Boggs also received 96 shares of AT&T stock and a life insurance policy that names Sandra Boggs as beneficiary.

In her will, the first Mrs. Boggs bequeathed one-third of her estate and a lifetime usufruct in the remaining two-thirds to her husband. She designated her three sons as the owners of the naked or revisionary interest in the portion of her estate over which Isaac Boggs held a usufruct. Among

the assets listed in the succession of Dorothy Boggs was her community property interest in her husband's pension valued at $42,388.57 in 1979. The succession documents valued Dorothy Boggs' interest at $21,194.29.

The Boggs' sons, the defendants in this case, filed an action in Louisiana state court seeking an accounting of their father's usufruct and an award of some portion of the retirement benefits. Sandra Boggs then filed this case seeking a declaratory judgment that ERISA preempts the application of Louisiana community property law to this qualified plan. Specifically, the plaintiff, the second wife, argued that ERISA controls the disbursement of benefits and, under those rules, she is the designated beneficiary. The defendants responded by arguing that this case was not governed by ERISA and, therefore, the court lacked jurisdiction. In addition, the defendants argued that ERISA does not preempt Louisiana community property law. The district court responded by determining first that it had jurisdiction over the case under 29 U.S.C. section 1132. Further, the district court rejected the plaintiff's contention that ERISA preempts Louisiana community property law. The plaintiff asks us to review that decision.[1]

II.

Before we review the district court's determination regarding ERISA preemption, we must address the defendant's continuing contention that the district court lacked

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[1] The plaintiff also requests attorney's fees under 29 U.S.C. section 1132(g)(1) which allows the court to award ERISA beneficiaries, participants, and fiduciaries reasonable attorney's fees and costs when they are the prevailing party. Since we affirm the district court's denial of Sandra Boggs' request for a declaratory judgment, she is not entitled to attorney's fees.

jurisdiction to decide this case. 29 U.S.C. section 1132(a) creates ERISA jurisdiction and provides that:

> a civil action may be brought by a participant or beneficiary . . . to recover benefits due to him under the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the plan...".

In this case, Sandra Boggs, the plaintiff, is a beneficiary of the benefits plan; she is currently receiving a survivor's annuity. Further, she seeks to clarify her right to pension benefits under the South Central Bell plan. This type of action is expressly authorized by the jurisdictional provisions of section 1132 and the district court properly concluded that it had jurisdiction to resolve this case.

III.

The plaintiff, Sandra Boggs, seeks a declaratory judgment that ERISA preempts Louisiana community property law and, thereby, prevents the Boggs' children from receiving any portion of their father's pension benefits. The district court rejected the plaintiff's arguments and, on appeal, she asks us to reconsider the preemption issue. We review the district court's preemption analysis de novo.[2]

ERISA was enacted to protect the interests of the beneficiaries of employee benefit plans.[3] The Act "imposes

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[2] *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994).

[3] *Ingersoll-Rand Company v. McClendon*, 498 U.S. 133, 137 (1990).

participation, funding, and vesting requirements on pension plans" and also regulates issues such as "reporting, disclosure, and fiduciary responsibility".[4] One important goal of ERISA is to impose uniform standards on plan administrators. Congress attempted to guarantee uniformity when it included ERISA's broad preemption provision.[5] 29 U.S.C. section 1144 (a) provides that the provisions of ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)".

This provision has been interpreted broadly. Courts recognize the " 'deliberately expansive' language chosen by Congress".[6] Thus, any state law which "relates to" an ERISA-qualified employee benefits plan is preempted. A state law "relates to" and ERISA plan "in the normal sense of the phrase, if it has connection with or reference to such a plan".[7] A state law can relate to an employee benefit plan even if it is not designed to regulate in the area of employee benefits or if its effect is indirect.[8]

The broad sweep of the ERISA preemption provision, however is not without limits.[9] The language of the statute

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[4] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 91 (1983).

[5] *Ingersoll-Rand Company*, 498 U.S. at 137.

[6] *Hook*, 38 F.3d at 781.

[7] *Shaw*, 463 U.S. at 96-97.

[8] *Rozzell v. Security Services, Inc.*, 38 F.3d 819, 821 (5th Cir. 1994) (citing *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987)).

[9] *Ingersoll-Rand Company*, 498 U.S. at 139; *see e.g., Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988).

indicates that it preempts only state laws which relate to a benefit plan. Further, we must recognize the general presumption "that Congress does not intend to preempt areas of traditional state regulation".[10] The Supreme Court has warned that, in determining the scope of ERISA's preemption provision, we must be mindful of traditional principles of federalism.[11] "[W]e must be guided by respect for the separate spheres of governmental authority preserved in our federalist system."[12] For example, in *Mackey v. Lanier Collection Agency,* the Supreme Court held that a Georgia statute governing garnishment procedures in that state was not preempted by ERISA even when it was used to garnish benefits received under an ERISA plan.[13]

To determine whether ERISA preempts state law, this Court engages in a two-part analysis. First, we are less likely to find preemption when the state law at issue "involves an exercise of traditional state authority".[14] Second, we consider whether the state law "affects relations among the principal ERISA entities— the employer, the plan, the plan fiduciaries, and the beneficiaries" or whether it only "affects

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[10] *FMC Corporation v. Holliday,* 498 U.S. 52, 62 (1990) (citing *Jones v. Rath Packing Co.,* 430 U.S. 519 (1977)).

[11] *See Hook,* 38 F.3d at 781 (citing the Supreme Court's warnings regarding placing some limit on the reach of the ERISA preemption provision in *Shaw v. Delta Airlines Inc.,* 463 U.S. 85 (1983) and *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504 (1981)).

[12] *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 522 (1981).

[13] 486 U.S. 825 (1988).

[14] *Sommers Drug Stores v. Corrigan Enterprises, Inc.,* 793 F.2d 1456, 1467 (5th Cir. 1986), *cert. denied,* 479 U.S. 1034 (1987), 479 U.S. 1089 (1987); *see also, Hook,* 38 F.3d at 781; *Memorial Hospital System v. Northbrook Life Insurance Company,* 904 F.2d 236, 245 (5th Cir. 1990).

relations between one of these entities and an outside party" or "two outside parties with only an incidental effect on the plan".[15]

In this case, the plaintiff asks us to conclude that ERISA preempts Louisiana community property law. The area of domestic relations has long been the domain of the states. As this Court has noted:

> Federal respect for state domestic relations law has a long and venerable history. When courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that state law should be given precedence . . . . The law of family relations has been a sacrosanct enclave, carefully protected against federal intrusion. One way our federalist system maintains the integrity of the folkways and mores of localities is through the conservation of state control over the creation and separation of families.[16]

A community property system governing the acquisition and ownership of property during marriage goes back to the earliest days of Louisiana as a French colony, and was carried on under the Spanish regime, and was embedded in the first Louisiana Constitution. It is an honored civilian institution, not the belated effort of a common law state to seek a tax advantage. The use of a community property system

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[15] *Sommers Drug Stores,* 793 F.2d at 1467, *see also, Hook,* 38 F.3d at 781; *Memorial Hospital,* 904 F.2d at 245.

[16] *Brandon v. Travelers Insurance Company,* 18 F.3d 1321, 1326 (5th Cir. 1994), *cert. denied,* 115 S.Ct. 732, 130 L.Ed. 2d 635 (1995) (engaging in the ERISA preemption analysis).

represents Louisiana's recognition of the value a spouse, though non-employed, contributes to a marriage. The system conceives of marriage as a partnership in which each partner is entitled to an equal share.

Under Louisiana community property law, each spouse owns "a present undivided one-half interest" in all community assets, which vests from the moment of acquisition.[17] Pension benefits, if acquired during the marriage, are generally considered a community asset.[18] Thus, if one spouse receives benefits from a pension plan, he or she must account to the other spouse for this benefit which vests equally in both spouses from the instant of acquisition.

The plaintiff contends that the broad sweep of ERISA acts to prevent the operation of Louisiana's marital property system and bans the enforcement of ownership rights granted by Louisiana law if those rights include an interest in employee benefits under an ERISA plan. We do not agree. A state community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators. The controversy in this case is between successive spousess and their heirs. The focus of this case is not the relationship between the administrator of this ERISA plan and its beneficiaray. "ERISA's preemptive scope may be broad but it does not reach claims that do not involve the administration of plans, even though the plan may be a party to a suit or the claim relies on the details of the

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17 *Hare v. Hodgins*, 586 So. 2d 118, 122 (La. 1991).

18 *Id.*

plan".[19] And, as we noted in the *Hook* decision:

> a preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction . . . . In other words, ERISA was meant to consume everything in its path.[20]

This Court concludes that, under the facts of this case, the Louisiana community property law is not sufficiently "related to" an employee benefit plan to necessitate ERISA preemption. Nothing is sought from the plan or its fiduciary. No duty will be imposed on the plan or the administrator. Benefits will continue to be paid to the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects employee benefit plans "in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan".[21] Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary. This is no greater effect than the state's garnishment laws. *Mackey*, 486 U.S. 825 (1988).

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19 *Hook*, 38 F.3d at 784.

20 *Id.* at 786. (citations omitted).

21 *Shaw*, 463 U.S. at 100 n.21. The dissent suggests that our decision today will create uncertainty regarding whether plan participants will actually receive their anticipated retirement income. The issue here, however, is not whether Isaac Boggs was entitled to his benefits as against the plan administrators, but whether, once received, he owed any of those benefits to the estate of his deceased spouse based on their thirty year marriage.

The plaintiff attempts to rely on two additional statutory sources to support her contention that Louisiana community property law has been displaced. First, she cites ERISA's spendthrift provision which prohibits the assignment or alienation of plan benefits.[22] She also cites 26 U.S.C. section 408, enacted as part of ERISA, which defines an IRA as a trust held by the United States for the benefit of the employee "without regard to any community property laws".[23] First, it is important to note that neither provision can substitute for an analysis under the general preemption provision. Section 1144 (a) carries out the power of Congress to preempt and it controls any determination of the boundaries of ERISA preemption. With this in mind, we examine the individual statutes cited and determine what impact, if any, they have on the operation of Louisiana community property law.

The purpose of the spendthrift provision is to prevent plan participants from recklessly divesting themselves of plan benefits before retirement. This provision was not intended to affect support obligations among the members of a family. Furthermore, a non-participant spouse's ownership of an interest in the participant spouse's retirement benefits involves neither an alienation nor an assignment. Under

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[22] 29 U.S.C. section 1056 (d) (1).

[23] 26 U.S.C. section 408 provides in pertinent part:

> (a) . . . For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries . . .
>
> (g) . . . This section shall be applied without regard to any community property laws.

community property law, ownership vests immediately in the non-earning spouse, and no transaction is needed to convey ownership. Thus, no transaction prohibited by the ERISA spendthrift provision has occurred.

The plaintiff argues further that the bequest by Dorothy Boggs of a portion of her interest in the retirement benefits was an attempted alienation in violation of the spendthrift provision. We disagree. Dorothy Boggs held an ownership right in the pension. Her spouse, or his estate, owes her an obligation to account for her share of the pension. Once her estate received this benefit, her will operates to transfer ownership to her three sons. This final alienation, two steps removed from the disbursement of benefits, is not a violation of the provisions of ERISA. ERISA "is concerned not so much with what the beneficiary does with his pension checks or how they are spent but with whether those in charge actually deliver the benefits".[24]

The plaintiff also relies on a Ninth Circuit Court case interpreting the spendthrift provision, *Albamis v. Roper*.[25] In that case, the Ninth Circuit Court determined, based almost exclusively on an analysis of this provision, that ERISA preempts California community property law.[26] The plaintiff asks this Court to adopt the reasoning of the *Albamis* court and hold that ERISA preempts Louisiana community property law. We cannot adopt the reasoning of the Ninth

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[24] *United Association of Journeymen v. Myers*, 488 F. Supp. 704, 712 (M.D. La. 1980), *affirmed by*, 645 F.2d 532 (5th Cir. 1981) (reviewing the legislative history of ERISA).

[25] 937 F.2d 1450 (9th Cir. 1991).

[26] *Id.*

Circuit Court because we feel their preemption analysis places too much emphasis on a broad interpretation of the spendthrift provision.

Finally, the plaintiff relies on 26 U.S.C. section 408. This provision governs the trust relationship between the government and the participant whose benefits are placed in an IRA account. It does not affect that participant's later obligation to his spouse to account for her portion of the benefits. This provision governing the disbursement of IRA funds cannot reasonably be interpreted to intervene in the marital relationship and divest one spouse of ownership rights.

IV.

The district court correctly concluded that ERISA, despite its exclusive control of benefits law and its broad preemption provision, does not preempt the community property laws created by the State of Louisiana. Accordingly, we AFFIRM.

KING, Circuit Judge, dissenting:

I respectfully dissent from the majority's conclusion that ERISA does not preempt the provisions of the Louisiana community property law that would operate here to divest a participant's widow of a portion of the benefits from pension plans that she would be entitled to receive under ERISA in favor of the heirs of his predeceased spouse. It defies reality to say that the widow's rights under ERISA have only been 'tenuously, remotely or peripherally' affected by Louisiana law. They have been gutted. I recognize that the preemption issue is conceptually as difficult as the bottom line is easy. But I am persuaded that the Ninth Circuit in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), and the Department of Labor in DOL Advisory Opinion # 90-46A (December 4, 1990) and in its excellent amicus brief submitted at our request have the better arguments. ERISA was enacted to protect the living - plan participants and their dependents - and it was amended in 1984 to protect divorced spouses of plan participants. Key objectives of the statute were to establish uniformity in the law nationwide and certainty in its application, objectives that are implemented in part by its preemption provision. Today's decision will create great uncertainty in the principal tenet of the statute that Congress strived to make certain: that a plan participant and his or her spouse will actually receive their anticipated retirement income.

APPENDIX C

26 U S C 408

§408: Individual retirement accounts.

(a) Individual retirement account. For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) in section 402(c). 403(a)(4), or 403(b)(8), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year in excess of $2,000 on behalf of any individual.

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the

entire interest of an individual for whose benefit the trust is maintained.

x x x

(g) Community property laws. This section shall be applied without regard to any community property laws.

APPENDIX D

29 U S C 1055

29 § 1055

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that—

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

(b) Applicable plans

(1) This section shall apply to—

(A) any defined benefit plan.

(d) **"Qualified and joint survivor annuity" defined**

For purposes of this section, the term "qualified joint and survivor annuity" means an annuity—

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the acturial equivalent of a single annuity for the life of the participant.

29 USC 1056

§ 1056 Form and payment of benefits

x x x

(a) — (c) omitted

(d) Assignment or alienation of plan benefits.
(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.
(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before the date of enactment of this Act [enacted Sept. 2, 1974]. The preceding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of the Internal Revenue Code of 1986 [26 USCS §4975] (relating to tax on prohibited transactions) by reason of section

4975(d)(1) of such Code [26 USCS §4975(d)(1)]
(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a paraticipant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

29 USC 1132

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—
(1) by a participant or beneficiary—
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

x x x x

29 USC 1132

(e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties. The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

29 USC 1144

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

(c) Definitions. For purposes of this section:
(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.
(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

x x x

APPENDIX E

LOUISIANA CIVIL CODE

Art. 538. Usufruct of consumable things

If the things subject to the usufruct are consumables, the usufructuary becomes owner of them. He may consume, alienate, or encumber them as he sees fit. At the termination of the usufruct he is bound to pay to the naked owner either the value that the things had at the commencement of the usufruct or deliver to him things of the same quantity and quality.

Acts 1976, No. 103, § 1, eff. Jan. 1, 1977.

Art. 890. Usufruct of surviving spouse

If the deceased spouse is survived by descendants and shall not have disposed by testament of his share in the community property, the surviving spouse shall have a legal usufruct over so much of that share as may be inherited by the descendants. This usufruct terminates when the surviving spouse contracts another marriage, unless confirmed by testament for life or for a shorter period.

The deceased may by testament grant a usufruct for life or for a shorter period to the surviving spouse over all or part of his separate property.

A usufruct authorized by this Article is to be treated as a legal usufruct and is not an impingement upon legitime.

If the usufruct authorized by this Article affects the rights of heirs other than children of the marriage between the deceased and the surviving spouse or affects separate property, security may be requested by the naked owner. Acts 1981, No. 911, § 1; Acts 1981, No. 919, eff. Jan. 1 1982; Amended by Acts 1982, No. 445 § 1; Acts 1990, No. 1075, § 1, eff. July 27, 1990.

LOUISIANA CIVIL CODE

Art. 2335. Classification of property

Property of married persons is either community or separate, except as provided in Article 2341.1.

Acts 1979, No. 709, § 1. Amended by Acts 1991, No. 329, § 1.

Art. 2336. Ownership of community property

Each spouse owns a present undivided one-half interest in the community property. Nevertheless, neither the community nor things of the community may be judicially partitioned prior to the termination of the regime.

During the existence of the community property regime, the spouses may, without court approval, voluntarily partition the community property in whole or in part. In such a case, the things that each spouse acquires are separate property. The partition is effective toward third persons when filed for registry in the manner provided by Article 2332.

Acts 1979, No. 709, § 1. Amended by Acts 1981, No. 921, § 1; Acts 1982, No. 282, § 1.

Art. 2338. Community property

The community property comprises: property acquired during the existence of the legal regime through the effort, skill, or industry of either spouse; property acquired with

community things or with community and separate things, unless classified as separate property under Article 2341; property donated to the spouses jointly; natural and civil fruits of community property; damages awarded for loss or injury to a thing belonging to the community; and all other property not classified by law as separate property.

Acts 1979, No. 709, § 1, eff. Jan. 1, 1980.

Art. 2369. Accounting between spouses; prescription

A spouse owes an accounting to the other spouse for community property under his control at the termination of the community property regime.

The obligation to account prescribes in three years from the date of termination of the community property regime.

Acts 1979, No. 709, § 1, eff. Jan. 1, 1980.

APPENDIX F

U.S. Department of Labor

Pension and Welfare Benefits Administration
Washington, D.C. 20210

DEC 4 1990 AO 90-46A

Ms. Ellen O. Pfaff
Lane Powell Moss & Miller
3800 Rainier Bank Tower
Seattle, Washington 98101-2647

Dear Ms. Pfaff:

This responds to your request for an advisory opinion, on behalf of the trustee of the Bruce A. Nordstrom Self-Employed Retirement Plan (Plan), concerning the application of sections 514 and 206(d) of the Employee Retirement Income Security Act of 1974 (ERISA) with respect to the court order described below.[1] Your submission contains the following facts and representations.

The Plan is a tax-qualified retirement plan[2] under which benefits are payable upon the participant's retirement or death. The Plan provides that benefits may not be assigned or alienated except in the case of a "qualified domestic relations order." Bruce A. Nordstrom is a Plan participant whose

---

[1] For convenience, this letter refers to the provisions of section 206(d) of ERISA rather than to the corresponding provisions in sections 401(a)(13)(B) and 414(p) of the Internal Revenue Code, to which your request refers.

[2] You indicated in a telephone conversation with a representative of this Office that the Plan has a number of participants and is covered by title I of ERISA.

benefit account is not in pay status.

Bruce Nordstrom's wife, Frances W. Nordstrom, died October 5, 1984. Her will was admitted to probate in the Superior Court for the State of Washington at King County (the Court). Subsequently, the estate of Frances Nordstrom (the Estate) filed a petition asking the Court to require the Plan to divide and segregate that portion of Bruce Nordstrom's benefits which represents the interest of the Estate. You indicate the request was made on the grounds that, *inter alia*, Frances Nordstrom owned at her death an undivided one-half community interest in Bruce Nordstrom's accrued benefits pursuant to the community property law of the State of Washington and that a court order for such division and segregation of benefits could issue in accordance with section 206(d)(3) of ERISA. The Court granted the petition and entered an order styled "Qualified Domestic Relations Order and Order Dividing Retirement Plan Benefits" (the Court Order).

You request the views of the Department of Labor concerning whether the community property law of the State of Washington is preempted by section 514 of ERISA and whether the Court Order falls within the scope of section 206(d)(3) of ERISA. Section 514(a) of ERISA generally preempts all state laws insofar as they relate to employee benefit plans covered by title I of ERISA. Therefore, a state community property law that considers the pension earned by a married spouse to be community property is preempted under this provision, unless some exception applies.

Section 514(b) of ERISA specifies certain exceptions from the broad preemptive effect of section 514(a). Of those exceptions, only that provided by section 514(b)(7) has relevance to community property laws. Section 514(b)(7) states that preemption under section 514(a) does not apply to "qualified domestic relations orders" within the meaning of ERISA section 206(d)(3)(B)(i).

Section 206(d)(1) of ERISA generally requires pensions plans covered by title I of ERISA to provide that plan benefits may not be assigned or alienated. Section 206(d)(3)(A) of ERISA states that section 206(d)(1) applies to an assignment or alienation of benefits pursuant to a "domestic relations order," unless the order is determined to be a "qualified domestic relations order" (QDRO). Section 206(d)(3)(A) further provides that pension plans must provide for payment of benefits in accordance with the applicable requirements of any QDRO.

Section 206(d)(3)(B) of ERISA defines the terms "qualified domestic relations order" and "domestic relations order" for purposes of section 206(d)(3) as follows:

> (B) For purposes of [section 206(d)(3)] —
>
> (i) the term "qualified domestic relations order" means a domestic relations order—
>
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
>
> (II) with respect to which the requirements of a subparagraphs (C) and (D) are met, and
>
> (ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which —

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a *community property law*). (emphasis added)

The term "alternate payee" is defined by ERISA section 206(d) (3) (K) to mean "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant."

Section 514(b) (7) and 206(d) (3) of ERISA were enacted as part of the Retirement Equity Act of 1984 (REA), which aimed primarily at assuring greater and more equitable opportunity for women working as employees or homemakers to receive private pension income. The legislative history of the QDRO provisions of REA contains numerous statements indicating that Congress was focusing on the division of pension benefits in marital dissolution or dependant support situations. For example, Congressman William Clay described the QDRO provisions during a House floor debate on the legislation as follows:

> Finally, women may be denied their rights to pension benefits by the dissolution of a marriage by divorce, regardless of how many years she served as an economic partner to a man covered by a pension plan. Even in cases in which the State domestic relations court is willing to consider the pension an asset of the marriage and award the ex-

> wife a share of it, her rights have been thwarted. Pension plans have refused to honor those court orders claiming that they required an impermissible assignment of benefits and were preempted by ERISA.
>
> H.R. 4280 makes it clear that honoring a legitimate State court order awarding an ex-spouse some or all of a worker's pension does not violate the antiassignment clause of ERISA. In addition, the legislation creates an exception from ERISA's broad preemption of State laws for qualified domestic relations orders.[3]

Moreover, the report of the Senate Committee on Finance made specific mention of state community property laws in observing that "[s]everal cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (*e.g.*, alimony, separate maintenance, and child support obligations)."[4] The report noted "[t]here is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan,"[5] and cited two cases in which application of state community property law to pension benefits was at issue in the context of marital dissolution proceedings.[6]

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[3] 130 Cong. Rec. 13327 (1984).

[4] S. Rep. No. 575, 98th Cong., 2d Sess. 18 (1984).

[5] *Id.* 19.

[6] The cases cited were *Stone* v. *Stone*, 632 F. 2d 740 (9th Cir. 1980) and *Francis* v. *United Technology Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978).

It thus appears Congress generally intended that the QDRO provisions of ERISA would have application in those court proceedings conducted primarily to resolve domestic relations issues. With respect to ERISA section 206(d) (3) (B) (ii) (II), it is the view of the Department of Labor that Congress intended the QDRO provisions to encompass state community property laws only insofar as such laws would ordinarily be recognized by courts in determining alimony, property settlement and similar orders issued in domestic relations proceedings. We find no indication Congress contemplated that the QDRO provisions would serve as a mechanism in which a non-participant spouse's interest derived only from state property law could be enforced against a pension plan.

In the case at hand, the Court Order was issued in a probate proceeding and would recognize an interest in pension benefits of the surviving spouse solely on the basis of the state community propery law. Consistent with the view discussed above, it is the opinion of the Department of Labor that the Court Order is not a "domestic relations order" within the meaning of section 206(d) (3) (B) (ii) of ERISA and, therefore, does not constitute a QDRO for purposes of sections 206(d) (3) and 514(b) (7) of ERISA. Accordingly, it is the opinion of the Department of Labor that the Court Order is unenforceable against the Plan.

This letter constitutes an advisory opinion under ERISA procedure 76-1. Section 10 of the procedure explains the effect of advisory opinions.

Sincerely,

Robert J. Doyle
Director of Regulations
and Interpretations

Supreme Court, U.S.
FILED
JUL 11 1996
OFFICE OF THE CLERK

NO. 96 - 79

In the Supreme Court of the United States

OCTOBER TERM 1996

SANDRA JEAN DALE BOGGS,
Petitioner

VERSUS

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX

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55 pp

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APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-30178

FILED
JUL 16 1996

SANDRA JEAN DALE BOGGS,
Plaintiff-Appellant,

versus

THOMAS F. BOGGS, HARRY P. BOGGS,
AND DAVID B. BOGGS,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Opinion April 17, 1996

Before WISDOM, KING and DUHE', Circuit Judges.

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

(✓) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the Judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ John Minor Widom

JOHN MINOR WISDOM
United States Circuit Judge

APPENDIX H

No. 94-30178, *Boggs v. Boggs*

WIENER, Circuit Judge, with whom POLITZ, Chief Judge, KING, BENAVIDES, STEWART and PARKER, Circuit Judges, join, dissenting from failure to grant rehearing en banc.

My concerns about the panel majority opinion in this case prompted me to request a poll of the active judges of this court to rehear the case en banc. In the ensuing poll, less than a majority of the judges voted to rehear the case. With the utmost respect, I dissent from the refusal of a majority of the active judges of this court to rehear this case en banc.

I

WHY EN BANC?

The instant appeal forces us to come to grips with the conundrum that results when the irresistible force of ERISA,[1] particularly its preemption and anti-alienation provisions, meets the immovable object of a state's community property regime, particularly its immediate vesting and assignability provisions. The panel opinion held that the force of ERISA could not budge Louisiana's community property regime; and in so holding created a circuit split with the

[1] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*

"other" majority community property circuit.[2] Despite the split thus created, the monumental and pervasive effect on the great majority of the residents of this circuit, and the 2-to-1 division of the panel that heard this appeal, this court refused to rehear the panel opinion en banc. I write separately not only to voice my disappointment with that failure of the entire court to consider such an important appeal, but also to address the merits of this issue of great consequence.

Recognizing that employee benefit plans affect "the continued well-being and security of millions of employees and their dependents,"[3] Congress enacted the unique and highly pervasive Employee Income Retirement Security Act (ERISA) in 1974, thus making the regulation and administration of non-governmental retirement and benefit plans an exclusively federal concern. Today, over twenty years later, the preeminence and importance of pension plans and welfare benefit plans in the lives of most Americans has grown exponentially. With their combined assets totaling over 4.7 *trillion* dollars, employee benefit plans cover an estimated 54 million employees.[4] In addition to its economic

[2] *See Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991). The Ninth Circuit includes the community property states of Arizona, California, Idaho, Nevada, and Washington. In substantially similar circumstances, the Department of Labor also has concluded that ERISA mandates preemption. DOL Advisory Opinion # 90-46A (December 4, 1990).

[3] 29 U.S.C. § 1001(a).

[4] U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES at 383, 535 (115th ed. 1995).

significance, this landmark legislation plays a dominant role in present-day federal jurisprudence as reflected, for example, by the unusually high number of ERISA cases for which the Supreme Court has granted writs in recent years.[5] In sum, ERISA and employee benefit plans are ubiquitous and integral parts of our society.

Within the foregoing framework, the following two factors were urged by the panel majority as reasons why this case should *not* be voted en banc: (1) the parties themselves had not filed a motion for panel rehearing or suggestion for rehearing en banc, and (2) the arguments that I presented in favor of ERISA preemption are not the arguments that were presented to the district court or to the panel. In this instance, I find those reasons wholly unpersuasive.[6] Morevoer, they obscure the fact that this case presents an issue of critical and continuing importance to both temporary and permanent residents - past, present, and future - of all community property states, a category comprising the two most populous states of this circuit.[7] Not only is this issue

[5] *E.g., Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996); *Peacock v. Thomas*, 116 S. Ct. 862 (1996); *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995); *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223 (1995).

[6] First, we cannot tell why the appellant has not asked for panel or en banc rehearing: It may be economics, it may be personal, it may be tactical, etc. Regardless of the reason, such inaction by the parties should not here control our determination to rehear a case of this importance. Second, my argument favoring rehearing this case en banc and the analysis that follows, focuses on the *legal* interpretation of ERISA's presemption and spendthrift provisions. These are *issues* and they have been briefed by both parties; they are not 'new" issues. Moreover, to the extent that any of my *arguments* discuss new theories which should not be entertained - a proposition with which I disagree - these arguments are merely "belt and suspenders" support for the parties' arguments on the same issues that are and have been squarely before this court.

[7] Both Texas and Louisiana are community property states.

issue one of legal primacy, it literally touches the pocketbooks of hundreds of thousands if not millions of plan participants and their spouses during their retirement years. In addition to creating a circuit split, the panel opinion has all the "bombshell" potential of making an earth-shaking impact on an area of the law as pervasive as ERISA in general and pensions in particular. A case of this magnitude should bear the imprimatur of the entire court, even if the en banc court were ultimately to reach the same result as has the panel.

II

THE MERITS

I do not suggest that the substantive issues of this case are easy ones. Indeed, in addition to an understanding of the complexities of ERISA, an understanding of the nature of retirement plans, particularly defined benefit plans, is crucial. To begin with, it is axiomatic that there can be no rights greater than those created by the retirement *plan*, the contents of which, for ERISA plans, is largely dictated by that statute. That the panel majority "granted" to the *heirs* of the predeceased *first* spouse an interest in the survivor annuity of the *second* spouse - despite the undeniable fact that this survivor annuity never even came into existence during the lifetime of the first spouse, but only upon her widower's re-marriage - may suggest that proper consideration has not been given to the nature of pensions in general or to the Bell Plan itself.

It is equally axiomatic that this appeal requires a keen understanding of the law of ERISA. As this court could not duck the core issue of preemption which lies at the busy intersecton where ERISA and community property law collide, I would have had us conclude that the length and breadth of the preemption mantle in which Congress has cloaked ERISA gives it the right-of-way. More specifically, I would

have had our court hold that ERISA preempts Louisiana community property law to the extent that such law would purport to recognize and enforce an interest of the heirs or legatees of a deceased nonparticipant spouse as to her "community interests" in an ERISA-qualified pension plan. As explained more fully below, I believe that this conclusion is compelled by the mandate of the federal statute, the intent of Congress, and the purposes and structure of ERISA, not the least of which is the requirement of national uniformity of such pension plans in the private sector of our national economy. Furthermore, that the state law claims in this case have been brought against the beneficiaries of the plan, as opposed to the plan itself or the plan's fiduciary, in no way circumvents or defeats ERISA's potent preemptive force.

A

FACTS AND PROCEEDINGS

Isaac Boggs (Participant) was employed by South Central Bell from June 18, 1949, until his retirement on September 1, 1985, and participated in an ERISA-qualified pension plan (the Bell Plan). Participant was already married to Dorothy Boggs (First Spouse) when he went to work for South Central Bell. Their marriage lasted until her death, which occurred some six years prior to his retirement. At all relevant times their Louisiana marital property regime was one of community property. Three sons of that marriage - David Bruce Boggs, Thomas Frank Boggs, and Harry Maurice Boggs (the Sons), Defendants-Appellees herein - survived both of their parents.

When First Spouse died, her estate included an undivided one-half interest in all property belonging to the community of acquets and gains theretofore existing between her and Participant (the community). By testament, First Spouse left

one-third (1/3) of her estate to Participant outright and confirmed to him for his lifetime the usufruct[8] of the surviving spouse in the remaining two-thirds (2/3) of her estate. She left to the Sons the naked ownership[9] of the two-thirds share of her estate that she burdened with Participant's usufruct.

Among the assets inventoried in the judicial administration of First Spouse's succession was a one-half (½) community interest in Participant's account in the Bell Plan. As the balance of his account was valued at $42,388.57, her community half interest was listed in her succession at $21,194.29.

Within a year after the death of his First Spouse, Participant remarried. His second and final marriage was to Plaintiff-Appellant Sandra Jean Dale Boggs (Surviving Spouse), to whom he was married and with whom he was residing at the time of his death in 1989.

The Bell Plan provided several types of retirement benefits to Participant. The first benefit that he received on retirement was a lump sum payment of $151,628.94, which he "rolled over" into an Individual Retirement Account (IRA). It was worth $180,778.05 at his death. Participant's second retirement benefit was a pension annuity, which provided monthly payments of $1,777.67 until his death, then converted automatically to a survivor's annuity in favor of Surviving Spouse. That annuity continues to provide monthly payments to her and is scheduled to do so for her lifetime. The third benefit that Participant received on retirement consisted of 96 shares of AT&T stock and a life insurance policy in which Surviving Spouse was designated as the beneficiary.

---

[8] Roughly the equivalent of a common law life estate.

[9] Roughly the equivalent of a common law remainder interest.

The fact that all relevant employee benefit plans of South Central Bell are ERISA plans is undisputed.

Some time after Participant's death in 1989, the Sons filed an action in state court seeking an accounting on the usufruct that their mother had confirmed to Participant in her testament, as well as a judgment awarding them a portion of his retirment benefits. Of particulr significance to this appeal is the fact that the Sons have claimed an ownership interest in past and future annuity payments to Surviving Spouse.

In response to the Sons' state court action, Surviving Spouse filed this suit in district court seeking a declaratory judgment that ERISA preempts the Sons' Louisiana community property claims to the extent that they purport to affect either past or future retirement benefits received or to be received by Participant or by Surviving Spouse under the Bell Plan. Specifically, Surviving Spouse asserted that ERISA alone governs the entitlement to and payment of benefits under the Bell Plan, and that under ERISA rules she is the designated beneficiary. The Sons countered, insisting that this case is not controlled by ERISA, as a consequence of which the district court lacked jurisdiction. The Sons argued alternatively that ERISA does not preempt any of the aspects of Louisiana community property law that are at issue in this case.

As preliminary matter, the district court determined that it did have jurisdiction by virtue of 29 U.S.C. § 1132. Proceeding to the merits, the district court rejected the contentions of Surviving Spouse that ERISA preempts the applicable provisions of Louisiana community property law, and denied her the declaratory judgment she sought. On appeal Surviving Spouse asked this court to review and then reverse that decision. Two of the three judges on the panel that heard

the appeal of that ruling affirmed it, and I provoked an en banc poll in which a majority of my colleagues voted against rehearing. It is from that vote that I respectfully dissent.

B

ANALYSIS

I have no quarrel with the district court's ruling on jurisdiction or with the panel's affirmance thereof. I therefore proceed directly to the substantive issues of the case. Surviving Spouse sought a declaratory judgment that ERISA's preemption and its anti-alienation rules trump any state cause of action that would recognize an interest of the heirs or legatees of the predeceased nonparticipant spouse in any retirement benefits under an ERISA plan when the basis of the claims of the heirs or legatees is the purported "alienation" — here, a testamentary transfer — of such nonparticipant spouse's putative community property interest in those plan benefits. The district court found no ERISA preemption and rejected the arguments of the Surviving Spouse. On appeal, she asked this court to revisit the preemption issue and reverse the district court. I shall review the district court's preemption analysis de novo,[10] examining briefly the pertinent aspects of Louisiana's community property regime and then, in greater detail, the pertinent aspects of ERISA.[11]

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[10] *Hook v. Morrison Milling Co.*, 38 F.3d 776, 780 (5th Cir. 1994).

[11] My analysis focuses solely on the preemption of state law as it applies to ERISA-covered pension plans. As noted above, Participant "rolled over" a portion of his benefits into an IRA. An IRA, of course, is not an ERISA-covered pension plan. It is worth pointing out, however, that at First Spouse's date of death none of the benefits had been "rolled over"; all were still held by the trusts that were ERISA-covered pension plans. For me, this fact is reason enough to conclude that the benefits which were eventually "rolled over" are not excepted from my preemption analysis. Neither the district court nor the panel majority, however, addressed this issue.

1. *Community Property Rights*

Louisiana's community property system recognizes the contribution made by each spouse, employed or unemployed, to the marriage and to the acquisition of marital property. Under Louisiana community property law, each spouse owns "a present undivided one-half interest" in each community asset, which interest vests from the moment the asset is acquired.[12] Louisiana law provides that, at the termination of the community propety regime, each spouse owes to the other spouse (or, when the community is terminated by the death of the spouse, to his or her heirs or legatees) an accunting for community property under his or her control.[13] Generally, retirement benefits acquired during the existence of the community are considered by Louisiana law to be community assets.[14]

2. *ERISA - The Statute*

Perhaps the most novel and pervasive private civil legislation enacted by Congress in the last quarter century, ERISA is a comprehensive statute which uniquely is co-administered by two departments of the federal government[15] and is designed to protect the interests of

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footnote 11 continued

Also not addressed were the nature and the terms of the plan from which these "rolled over" benefits were received. My conclusion in favor or preemption, however, in no way depends on the type of ERISA-covered pension plan involved (e.g., defined benefit plan, profit sharing plan, etc.) or on its particular terms.

12 *Hare v. Hodgins*, 586 So.2d 118, 122 (La. 1991).

13 *See* La. Civ. Code Ann. art. 2369.

14 *Hare v. Hodgins*, 586 So.2d 118, 122 (La. 1991).

15 Department of the Treasury and Department of Labor.

participting employees and their dependents in nongovernmental employee benefit plans.[16] Congress adopted ERISA for the twin purposes of establishing national uniformity in employee benefit law and safeguarding retirement benefits.[17] A fundamental tenet of ERISA is that retirement benefits are protected to assure delivery of retirement income to participants and their dependents.[18] The overarching device that Congress wrote into ERISA as an all-encompassing umbrella to protect the operable provisions of the Act, and as the principal mechanism to ensure enforcement of those provisions, is *preemption:* supersedure of any state law related to an employee benefit plan.[19]

3. *Preemption*

Whether a particular state action is preempted by some federal law is always a question of Congressional intent.[20] "The purpose of Congress is the ultimate touchstone."[21] In divining Congressional intent, the starting point is an examination of the explicit statutory language and the structure and purpose of the statute.[22] Before embarking on that examination, though, I note at the outset, as did the panel

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16 *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990).

17 *Shaw v. Delta Air Lines*, 463 U.S. 85, 90-91 (1983).

18 *See* 29 U.S.C. § 1001b(a)(2) ("The Congress finds that the continued well-being and retirement income security of millions of workers, retirees, and their dependents are directly affected by such plans."); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990) (noting that the decision to safeguard a stream of income for pensioners and their dependents is a considered congressional policy choice).

19 29 U.S.C. § 1144(a).

20 *Ingersoll-Rand*, 498 U.S. at 137-38.

21 *Id.* at 138 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)).

22 *FMC Corp. v. Holliday*, 498 U.S. 52, 58 (1990).

majority, that domestic relations law has long been recognized as the domain of the states. The Supreme Court has acknowledged that "[s]tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that the state law be overridden."[23] This has never meant, however, that domestic relation laws are wholly immune from federal preemption; moreover, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."[24] Nevertheless, for purposes of this preemption analysis, I assume without granting that the most deferential standard is applicable and proceed accordingly.[25]

Section 514(a) of ERISA[26] declares universally that ERISA shall "supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan

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[23] *McCarty v. McCarty*, 453 U.S. 210, 220 (1981) (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

[24] *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981).

[25] This deference accorded the states in the area of domestic relation law is usually applicble in the context of resolving a direct conflict between federal and state law rather than in a case implicating statutory preemption, such as ERISA's express preemption provision. Within this framework I nevertheless discern a distinction between community property law on the one hand - which is at least as much "property" law as it is "domestic relations" law — and, on the other hand, those state laws that govern purely interspousal aspects of domestic relations, such as marriage, separation, divorce, dower, curtesy, alimony, support of dependents, and the like. Thus I recognize the argument that, unlike the more purely status-related domestic relations laws, community property laws are fair game for ERISA and its preemption. The discussion *infra* of REA and its crown jewel, the QDRO, demonstrates beyond cavil that Congress too saw community property as fair game.

[26] 29 U.S.C. § 1144(a).

described in secton 4(a) and not exempt under section 4(b)."[27] Courts have interpreted § 514(a) most broadly, observing that its deliberately expansive language was designed "to establish pension plan regulation as exclusively a federal concern."[28]

The Supreme Court has given the phrase "relate to" a "broad common-sense meaning."[29] A state law *relates to* an ERISA plan "in the normal sense of the phrase if it has connection with or reference to such a plan."[30] A state law can relate to an ERISA plan even if that law was not specifically designed to affect such plans, and even if its effect is only indirect.[31] The Supreme Court has held a state law claim to be preempted when it was "premised on" the mere *existence* of an ERISA plan.[32]

Nevertheless, ERISA preemption is not wholly devoid of outer limits. The Suprme Court has cautioned that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[33]

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[27] *Id.* (emphasis added). Section 4(b) exemption is not implicated in this case.

[28] *Ingersoll-Rand*, 498 U.S. at 138 (internal quotations and citations omitted).

[29] *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 47 (1987).

[30] *Shaw*, 463 U.S. at 96-97.

[31] *Rozzell v. Security Services Inc.*, 38 F.3d 819, 821 (5th Cir. 1994) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987)).

[32] *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 131 (1992) (citing *Ingersoll-Rand*, 498 U.S. at 140).

[33] *Shaw*, 403 U.S. at 100 n.21, 103 S.Ct. at 2901, n.21.

So, even though the borderlines that define those outer limits are not bright, the Court has shown us the approximate boundaries of the wide band within which a state law may fall and still be preempted by ERISA: As long as there is *some* relationship between the effect of a state law and an ERISA plan, the state law can be said to relate to such plan and therefore be preempted; only if that relationship is so tenuous, remote or peripheral as to eschew any meaningful nexus with the ERISA plan will preemption be avoided. Even if the asserted effect of state law is premised on nothing more than the mere existence vel non of an ERISA plan, or was not overtly intended to affect such plans and only does so indirectly, ERISA will nevertheless preempt.[34] It is in this perspective of extreme (but not totally unlimited) ubiquity that I proceed to examine the state laws here at issue to see if they are sufficiently related to the Bell Plan to be preempted.

a. *Application of ERISA Preemption*

The essence of the Sons' state action is a determination of the ownership of and entitlement to retirement

[34] As an aid in the preemption inquiry, this court has noted that preemption of a state law claim is more likely to be found if "(1) the claim addresses areas of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan, and (2) the claim directly affects the relationship among the traditional ERISA entities (i.e., plan administrators/fiduciaries and plan participants/beneficiaries)." *Hook v. Morrison Milling Co.*, 38 F.3d 776, 781 (5th Cir. 1994); *see Sommers Drug Stores Co. v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467 (5th Cir. 1986). These factors appear to be the result of an attempt at distilling prior case law. *See Sommers*, 793 F.2d at 1467. Useful in some circumstances, it can be no substitute for an independent analysis of the issue presented. Although I believe a conclusion that ERISA preemption applies in this case could be reached using the factors above, the unique issue presented is best analyzed by examining the structure and purpose of the statute and Congressional intent on this point, the "ultimate touchstone" in determining preemption.

benefits under an ERISA pension plan, the Bell Plan. Thus, the Sons' claims are necessarily premissed on the very existence vel non of the Bell Plan.[35] The result sought by the Sons would effectively alter the Participant's beneficiary designation under the plan.[36]

The fact that the precipitating state court action happened to have been brought against the beneficiary only and not directly against the plan administrator does not immunize it from preemption. ERISA's broad preemption mandate is not nearly so limited: The indirect but palpable effect that the result sought by the Sons would have on the instant ERISA plan is none the less proscribed.[37]

As proof positive of a sufficient nexus between the Plan and the state law at issue, one need only observe, for example, that any calculation of the benefits claimed by the Sons would unquestionably require an analysis of the terms and conditions of the Bell Plan, as well as its records and those of its participants.[38] Moreover, plan administrators would

[35] *See Ingersoll-Rand*, 498 U.S. at 140.

[36] *See Moore v. Philip Morris Cos., Inc.*, 8 F.3d 335, 340 (6th Cir. 1993) (state law that affects eligibility for plan benefits "relates to" the plan for preemption purposes); *Brown v. Connecticut General Life Ins. Co.*, 934 F.2d 1193, 1195 (11th Cir. 1991) (state law determination of beneficiary of life insurance policy "relates to" an ERISA-covered employee benefit plan); *Shiffler v. Equitable Life Assurance Soc'y*, 838 F.2d 78, 81-82 (3d Cir. 1988) ("Thus while [the plaintiff] would have us consider her claims as setting forth state common law causes of action, clearly they 'relate to' the employee benefit plans when that phrase is given its broad common sense meaning, for no matter how her action is characterized her goal was to recover the proceeds claimed under the [plan].").

[37] *See Meeks v. Tullis*, 791 F.Sup. 154, 157 (W.D. La. 1992) (holding that a claim by the heirs of a nonparticipant spouse against non-ERISA assets for the value of the community property interest is preempted by ERISA).

[38] *See Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1294 (5th Cir. 1989)

be forced to take burdensome precautions to protect the rights and interests in plan benefits not only of the beneficiary but of the heirs and legatees as well.

In the context of national uniformity, the imposition of such additional duties, responsibilities, and liabilities on thousands of ERISA retirement plans and their fiduciaries would implicate different rules for each state in which one or more participants reside, thereby creating a polyglot nightmare of administration. Obviously, the pertinent provisions of those state property laws would have a material effect on employee retirement plans. Surely, their effect cannot be said to be "too tenuous, remote, or peripheral" to exempt those laws from ERISA's statutory preemption.

And, though ERISA does expressly provide some statutory exceptions to its preemption provisions, the Sons do not argue that any are applicable here; and I have found none of my own. As discussed more fully below, the Qualified Domestic Relations Order (QDRO) exception has not been satisfied; and the fact that Congress created other exceptions in other areas of the Act but provided none here is at least persuasive evidence that none was intended.

I therefore harbor no reservations in concluding that the Sons' putative state causes of action are *related to* the ERISA-covered Bell Plan and are therefore preempted by ERISA. I submit that the discussion which follows confirms that this conclusion is compatible with — more accurately, mandated by — Congressional intent and the purposes of ERISA, and demonstrates that, unless preempted, the states'

Footnote 38 continued

(holding that a state contract claim was "related to" an employee benefit plan and thus preempted when the court must refer to the pension plan to compute the damages sought, which were equal to the benefits he would have received under the plan).

laws in question would do "major damage" to the clear and substantial federal interests embodied in ERISA.

b. *Purposes and Structure of ERISA*

Not only do the causes of action proffered by the Sons come within the liberal scope of the preemption statute under the "related to" test, but a conclusion sustaining preemption comports with the intent of Congress, the "ultimate touchstone"[39] in determining preemption. This intent is manifest in the structure and announced purposes of ERISA and is underscored by REA.[40]

(i) *Ensuring Retirement Income*

Congress enacted ERISA to protect retirement benefits as a means of assuring receipt of *retirement income* by employees *and their dependents*. Conversely, nowhere in ERISA can the securing of inheritances by or legacies to the heirs or legatees of a participant employee or a nonparticipant spouse be identified as anything but antithetical to this purpose. In fact, allowing the heirs of a nonparticipant spouse to claim plan benefits — particularly when doing so violates the congressionally decreed hierarchy of recipients, at the pinnacle of which stands the surviving spouse-would directly undercut the statute's express purpose of ensuring that retirement income reaches participating employees and their dependents.

(ii) *Uniformity*

The other ERISA's twin purposes - national

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39 *Ingersoll-Rand*, 498 U.S. at 138.

40 Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.

uniformity[41] — would be frustrated if heirs and legatees were allowed to prevail under state laws that would produce results different from those produced by ERISA's rules governing entitlement to and distribution of benefits. Even though the structures of the various states' community property laws are generally similar, each community property state has its own unique set of specific rules affecting ownership and management of such property, including some notable differences from state to state.[42] Moreover, all community property rules differ substantially from the concomitant rules of non-community states. As already noted, allowing these disparate laws to trump ERISA could not help but have a materially adverse impact on plan administration as well. Unavoidably, the amount of retirement income available for each participant in a given plan would vary depending solely on the serendipity of a participant's state of residence from time to time. A domiciliary history of moving in and out of community property jurisdictions would create an impossible accounting and allocation problem. Quite simply, ERISA's goal of uniformity would be unattainable if the ultimate enjoyment of ERISA plan benefits were left to the vicissitudes of the varying and disparate marital property laws of the several states, be they community or separate.

c. *Retirement Equity Act of 1984 (REA)*[43]

Perhaps nothing argues more convincingly for the conclusion I here advocate than the congressional intent

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41 *See Ingersoll-Rand,* 498 U.S. at 137.

42 For example, in some states the income from separate property, such as retirement benefits acquired before marriage, is separate property, and in other states income from separate property becomes community property.

43 Pub. L. No. 98-397, 98-Stat. 1426.

manifested when ERISA was amended in 1984 by the enactment of REA.[44] As originally adopted, ERISA failed to express with sufficient clarity the nature and extent of the interests of a nonparticipant spouse in the participant spouse's ERISA-covered retirement plan. After ERISA had been on the books for a decade, Congress comprehensively amended and supplemented it with REA. One of the express purposes of REA was to confirm the importance of the financial security of the *non*participant spouse and to safeguard his or her interest from the havoc that could be visited on it by the death of or divorce from the participant spouse.[45] The primary way that REA achieves these intended results is by (1) inventing the QDRO as the one-*but only one*-mechanism for allocating plan benefits between spouses,[46] and (2) mandating that ERISA pension plans include automatic survivor benefits in favor of the nonparticipant spouse.[47]

Significant to the instant case is the widely recognized fact that a central impetus to Congress's adoption of REA was the burgeoning body of conflicting jurisprudence addressing spousal rights in plans and plan benefits, particularly

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44 I do not imply that REA is necessarily applicable to the instant case; only that it serves to remove doubt about the intent and purpose of Congress regarding the interplay of community property rules and ERISA, and the dominance of the latter when they conflict. The district court, however, expressly indicated that REA supported its holding. Moreover, even though the panel majority opinion did not expressly address REA, its holdings leave little doubt that its decision will be binding on cases in which no uncertainty exists that REA controls. It is important to note, however, that even in the instant case, there can be no question that the rights of Surviving Spouse, not the Sons, are protected by REA.

45 *Ablamis v. Roper,* , 937 F.2d 1450, 1453 (9th Cir. 1991).

46 *See* 29 U.S.C. §§ 1056(d) (3), 1144(b) (7).

47 29 U.S.C. §1055. The nonparticipant spouse can consent to waive this right if done in writing.

under community property regimes. During the ten years of ERISA's existence that preceded REA, disagreements developed among the various courts as to whether ERISA preempted state community property law claims to the extent that such laws related to the respective rights of the participant and nonparticipant spouses in and to benefits under ERISA plans.[48] REA deliberately-and, I believe, definitively-settled the issue by creating the QDRO and making it the one and only mechanism by which, inter alia, a nonparticipant spouse's community interest in an ERISA plan can be recognized in law.[49] I think that in the instant case the district court fell into the same trap that a number of other courts have fallen into since 1984[50]-citing and relying on now-obsolete *pre*-REA case law in a *post*-REA world - to support their erroneous conclusions that ERISA does not preempt causes of action of the nature instituted here by the Sons.[51]

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[48] *Compare Stone v. Stone*, 663 F.2d 740 (9th Cir. 1980) (holding that spousal community property rights on divorce were not preempted) *with Francis v. United Technology Corp.*, 458 F.Supp. 84 (N.D. Cal. 1978) (holding that ERISA preemption prevents the application of state community property law permitting attachment of plan benefits for family support purposes).

[49] A QDRO is any judgment, decree, or order made pursuant to a state domestic relations law (including community property) which (1) "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan," and (2) "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant." 29 U.S.C. § 1056 (d) (3) (B).

[50] *See e.g. Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991) (Fletcher, J., dissenting).

[51] For example, the district court cites *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), a case in which the Supreme Court held that federal law preempted division of benefits under the Railroad Retirement Act pursuant to community property laws. The *Boggs* district court relied on the statement in *Hisquierdo* that "[d]ifferent considerations might well apply

It seems unavoidable to me, though, that the passage of REA rendered nugatory the case law on point that was decided before passage of these amendments.

Although the QDRO was not developed to cope exclusively with community property issues under ERISA, both REA and its legislative history make absolutely clear that this imaginative invention was intended in large measure to deal with the recognition or partition of any community property interests *of the spouses* in plan benefits.[52] Indeed, the official legislative history of REA specifically notes that "[t]here is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension, etc., plan."[53]

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footnote 51 continued

where Congress has remained silent on the subject of benefits for spouses," and cited ERISA. In addition to the fact that this statement is dicta, this rationale is unpersuasive because, after the enactment of REA, Congress can no longer be said to have remained silent on the subject of benefits for spouses.

The *Boggs* district court also relied on *Carpenters Pension Trust Fund v. Campa*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028 (1980). In *Campa*, the state court held that ERISA did not preclude the division of pension rights in state marital dissolution proceedings. The district court stated that the Supreme Court's dismissal of *Campa* for want of a federal question serves as a decision on the merits that ERISA's preemption provision does not override community property law. Even assuming that *Campa* provides a federal common law exception to the preemption and anti-alienation provisions of ERISA to allow the heirs of a nonparticipant spouse to acquire an interest in the pension plan - and I do not believe that it does - the enactment of REA displaces any such exception.

[52] *See* 29 U.S.C. § 1056(d) (3) (B) (ii) (II) (defining a domestic relation order to include one made "pursuant to a State domestic relation law *(including a community property law)*.") (emphasis added).

[53] S.Rep. No. 98-575, 2d Sess. 19, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2565.

In the instant acronym, no letter is more important than "Q," for only when an [O]rder of a state [D]omestic [R]elations court is "[Q]ualified" does the post-REA version of ERISA permit an exception to the preemption rules in general and the anti-alienation ("spendthrift") rules in particular. The legislative history of REA states that "the Committee believes that conforming changes to the ERISA *preemption* provision are necessary to ensure that *only those orders that are excepted from the spendthrift provisions are not preempted by ERISA.*"[54] Thus, if a state court order that purports to divide spousal rights in an ERISA-covered plan does not meet the detailed, technical requirements of the federal statute, it is not "qualified" and therefore is afforded no exemption from ERISA's omnipotent preemption or anti-alienation rules. Quite clearly, I believe, with the advent of the QDRO, Congress purposefully provided an exclusive mechanism with which a nonparticipant spouse may obtain recognition of a community property right in the participant spouse's retirement plan.

What is also quite limited is the category of persons eligible to seek and obtain a QDRO: only spouses![55] Not their heirs, not their legatees, not their executors, not their trustees, not their creditors.[56] Akin to standing, the *right* of action to obtain a QDRO is strictly personal to the spouse qua spouse; and only a *living* spouse (or, in the event of divorce, a *living* ex-spouse) can obtain a QDRO.

Congress carefully crafted the QDRO to constitute a

[54] *Id.* (emphasis added).

[55] Of course, a dependent child can be an "alternate payee" under the statute with respect to orders relating to the provision of child support. *See* 29 U.S.C. § 1056 (d) (3) (B), (K). Providing for child support, however, is in no way implicated in this case.

[56] *See Ablamis*, 937 F.2d at 1456.

narrow exception to ERISA's otherwise all-encompassing preemption and spendthrift provisions. Any court order that purports to recognize the interest of a nonparticipant spouse — or of any other party, for that matter — in an ERISA plan or in the benefits of such a plan but fails to meet "qualification" muster under REA, in both form and substance, remains vulnerable to ERISA preemption. Here, neither a probate order nor a judgment in the suit filed by the Sons to obtain an accounting could even come close to meeting the stringent definition of a QDRO.[57] The fact that Congress surgically carved out this single exception to preemption and restricted its availability to living spouses or ex-spouses, counsels ever so strongly against allowing the heirs or legatees or creditors or trustees of a spouse to obtain partition of a putative community property interest in an ERISA plan in any manner other than the one expressly sanctioned by the statute. To do otherwise would be to turn this preeminent post-REA feature of ERISA on its head.

Neither did REA pave a one-way street. By way of tradeoff and consistency, REA brings to ERISA both parity and protection for the nonparticipant spouse. It does so by mandating survivorship rights for the nonparticipant spouse in and to plan benefits.[58] Any *surviving* nonparticipant spouse - whether first or subsequent - is the automotic successor beneficiary under the plan,[59] unless he or she shall

[57] *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

[58] 29 U.S.C. § 1055. This requirement applies to most, but not all, ERISA-covered plans. *See* 29 U.S.C. § 1055(b). I in no way suggest - and, indeed, would strongly disagree - that the conclusion in favor of preemption is applicable only to those ERISA-covered pension plans subject to this requirement.

[59] For example, if a vested participant dies after the annuity starting date, the accrued benefits payable to her will be paid to her surviving spouse in the form of a "qualified joint and survivor annuity" (QJSA). A QJSA is an annuity:

have executed an express and technically correct written consent in conformity with the statute.

Here again, I believe that the district court erred by relying on *pre*REA case law. It did so in an effort to support the statement that ERISA does not display any particular interest in preserving benefits for any particular beneficiary. But that statement is simply wrong: The exact opposite is true. Ever since the enactment of REA, ERISA has exhibited an extraordinary interest in protecting the surviving spouse of the participant employee, going so far as to trump the participant employee's own beneficiary designation if, absent spousal consent, the designee is not the participant's surviving spouse. By statutory enactment, then, Congress has elected to designate for each and every participant in an ERISA plan precisely who the "natural objects of his or her bounty" must be. And, in making that election, Congress has opted to elevate the nonparticipant spouse (or, in the case of divorce, the nonparticipant ex-spouse) above such presumptive candidates as the descendants or other heirs, legatees or assigns of either spouse. In and of itelf, this apparently arbitrary "prioritizing" might be viewed by some as an unusual federal instrusion into state marital property rights. But, if so, it is nevertheless an intrusion that Congress

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footnote 59continued

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less that 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant spouses, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

29 U.S.C. § 1055(d).

The survivor beneficiary rules also apply to certain individual account plans unless, inter alia, the vested account balance is payable in full, upon the death of the participant, to the participant's surviving spouse. *See* 29 U.S.C. § 1055 (b) (1). That a particular plan may be one of the plans excepted from these rules, however, would not affect the conclusion that ERISA preempts the Louisiana community property law claims at issue.

manifestly and expressly determined to be warranted - nay, required - to accomplish the ends of ERISA. And that is the prerogative of Congress, not of the courts.

Thus ERISA's survivor annuity rules unquestionably established protection of spouses as the top priority under the statute. These provisions reinforce the conclusion that no heritable right exists in the heirs of a predeceased spouse, whether participant or nonparticipant, particularly when such right could act to deprive a surviving spouse of the benefits expressly granted by the statute.[60] Moreover, these provisions illuminate the fact that in the instant litigation neither First Spouse nor her heirs and legatees have any property interest whatsoever in the payments received or to be received by Surviving Spouse as a survivor annuitant. Any right in personam that First Spouse might have had with respect to survivor annuity payments was conditioned on her outliving Participant; and even then she would have received payments from the plan only for the duration of her life. When First Spouse died, her right to a survivor annuity *evaporated.*

Additionally, if Participant had thereafter remained single until his death, no survivor annuity would have existed at all. The survivor annuity payments made and to be made to Surviving Spouse are the result of *federal* law's automatically creating this brand new right as a consequence of her marriage to Participant — his *second* marriage. Such a right has nothing whatsoever to do with the community that previously existed between Participant and First Spouse.

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[60] Ironically, if the Sons' cause of action were allowed to prevail, it would give a nonparticipant spouse greater ability than that of the participant to designate third parties as plan beneficiaries. That a participant spouse could thus be "disinherited" without his or her consent, whereas a nonparticipant spouse could not, would be both inconsistent and incompatible with the purposes of both ERISA and REA.

Thus, with respect to survivor annuity benefits of Surviving Spouse, there is simply no property or personal interest which First Spouse or her heirs can claim and no right of action against Surviving Spouse as the statutorily recognized beneficiary of the Bell Plan's survivor annuity.

REA's amendments to and augmentation of ERISA also reinforce the constant refrain that "pensions are for the living."[61] Both the QDRO mechanism and the survivor annuity rules accomplish this clear purpose of protecting a living dependent of the participant, regardless of whether the participant himself is living or deceased. And Congress in its wisdom has designated the nonparticipant spouse as the one among all of the employee's potential "dependents" who is to be thus protected. Again, in addition to achieving national uniformity, the other central purpose of ERISA is to protect pension benefits in the way best calculated to provide *retirement income* to employees and their living dependents — especially their surviving spouses — not to provide, ensure, or preserve legacies or inheritances, or the putative restamentary power of a nonparticipant spouse to alienate an interest in plan benefits. It seems certain to me that, when properly analyzed, a cause of action that would allow the heirs or legatees of a nonparticipant spouse to claim a state domestic property law interest in benefits otherwise payable to the participant or his congressionally favored dependent(s) flies in the face of congressional intent and does "major damage" to the purposes of ERISA.[62].

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[61] *Ablamis v. Roper*, 937 F.2d 1450, 1457.

[62] Although in the instant case Participant married Surviving Spouse after the death of his First Spouse, I am satisfied that REA supports preemption in all cases, including situations in which the plan participant remains single.

4. *Anti-Alienation*

Thus far I have examined ERISA preemption in relatively broad, conceptual terms, implicating primarily Congressional intent and statutory goals. But one must also ask if there is not something specific in ERISA that must be upheld or enforced, through the exercise of preemption, to ensure the attainment of those goals while maintaining the integrity of the statute as a cohesive whole. The answer is "yes"; and in this case that "something" is ERISA's prohibition of alienation, its so-called "spendthrift" rules. For, in ERISA'S unique and complex structure, "anti-alienation" is an indispensable, load-bearing element, and the one specifically at issue in this case. It is also key to understanding both the tension between ERISA and the community property provisions involved in this case, and the broader role of preemption as well.

ERISA's spendthrift provision unequivocally and unconditionally commands that "benefits provided under the plan may not be assigned or alienated."[63] Similar to (but not congruent with) the trust law concept from which it was borrowed, ERISA's uniquely crafted spendthrift provision is designed to protect retirement income and all other pension benefits not only from the claims of creditors and other third parties (such as heirs and legatees), i.e., "involuntary alienation," but from the participant's own foolishness and profligacy as well, i.e., "voluntary alienation." The Supreme Court has recognized that ERISA's spendthrift provision "reflects a considered congressional policy choice to safeguard a stream of income for pensioners (and their dependents ...), even if that decision prevents others from securing relief for the wrongs done them."[64]

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[63] 29 U.S.C. § 1056 (d) (1).

[64] *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 376 (1990).

The district court concluded that "ERISA's anti-alienation provision does not operate to preempt Louisiana community property law."[65] I could not disagree more strongly: ERISA's anti-alienation rule is directly implicated in and "inextricably intertwined" with the instant circumstances.

The district court grounded that conclusion on what appears to be two fallacious premises. First, citing *pre*-REA case law, the court stated that Congress did not intend to alter familial and support obligations when it enacted the anti-alienation provision. Here, the district court's undoing is, again, its reliance on cases made obsolete by the enactment of REA. As discussed in detail above, REA amended ERISA for the express purpose of cleaning up the mess created by prior inconsistent and misapprehending jurisprudence; REA created the unique concept of the QDRO and commissioned it to serve as the exclusive exception to anti-alienation.[66] Since the adoption of REA, it is only by obtaining a QDRO that the nonparticipant spouse or ex-spouse can avoid the spendthrift provisions of ERISA and have a community interest in an ERISA plan recognized.[67] The Sons do not argue, nor could they, that the QDRO requirements have been complied with in this case. The district court's first reason seems anachronistic at best, and clearly inapposite.

The second reason given by the district court for holding that the spendthrift provision is not implicated by the opera-

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[65] The court raised this anti-alienation argument *sua sponte*.

[66] *See* 29 U.S.C. § 1056 (d) (3).

[67] S. Rep. No. 98-575 at 19, *reprinted in* 1984 U.S.C.C.A.N. at 2565 ("The Committee believes that . . . the ERISA preemption provisions are necessary to ensure that only those orders that are excepted from the *spendthrift* provisions (i.e., QDROs] are not preempted.") (emphasis added).

tion of Louisiana's community property law is that the First Spouse's interest was "acquired by her directly at the outset and did not represent a transfer to her of rights which had previously accrued to [Participant]." I see that pronouncement as simply irrelevant. Indeed, the relevant "transfer" inquiry is not whether the *First Spouse* acquired her interest by way of a transfer, but whether the *Sons'* causes of action depend on the efficacy of the attempted transfer — *from* First Spouse *to* the Sons — of her community interest in the plan. Obviously it does, and just as obviously her attempted alienation is proscribed by ERISA's spendthrift provision, making it a nullity.

The Sons' action in Louisiana state court seeks an accounting of their father's usufruct. Apparently without analysis, the Sons implicitly assume that, among the interests that were included in their mother's legacy to them of the naked ownership of two-thirds of her half of all community assets, was some fractional interest in their father's account in the Bell Plan. Based on that erroneous assumption, the Sons proceed to seek an accounting, plus a judicial recognition of an ownership interest in past and future Bell Plan benefits. The district court appears to have proceeded on the same flawed assumption, i.e., that the First Spouse's legacy to the Sons effected a *transfer* of, inter alia, her community interest in the Bell Plan.

But, given ERISA's ban on both voluntary and involuntary alienation, the First Spouse had no legal power, whether inter vivos or testamentary, to effectuate a transfer - an alienation - of any interest in an ERISA plan. The Sons' asserted cause of action and the district court's reasoning presupposes that Participant's testamentary usufruct from First Spouse actually included an interest in Bell Plan retirement benefits. Yet he could not have received such an interest *from her* any more than could the Sons have received

from her a naked ownership interest in the plan benefits. As ERISA's spendthrift provision absolutely bars alienation,[68] a bequest of a usufruct in the plan benefits would be a prohibited transfer, just as would a bequest of the naked ownership. It thus seems indisputable that one asset that the testamentary usufruct never covered was the interest of the community in the Bell Plan or its benefits, regardless of the purported effects of the First Spouse's testament or her succession representative's treatment of such interests in her Louisiana succession.

Although not entirely clear, the Sons' asserted cause of action may also be grounded in the proposition that the Participant, as spouse, has an obligation to account for First Spouse's community property. Of course, as a designated beneficiary, Surviving Spouse would owe no such obligation to First Spouse's estate.[69] Thus, with respect to the cause of action against Surviving Spouse, this argument is simply irrelevant.

Framing the cause of action against Participant's estate as an obligation to account should not compel a different conclusion. In reality, the Sons' accounting action is a thinly disguised attempt to obtain ownership of "property" that they contend was bequeathed to or inherited by them. An absolute prerequisite of the heirs' right of action or standing to compel such an accounting, however, is that they have an interest

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[68] *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

[69] A designated beneficiary is not a debtor of the old comunity. Thus, the proceeds of a retirement plan payable to a designated beneficiary, like the proceeds of an insurance policy payable to a designated beneficiary, are not subject to execution in satisfaction of the debts of the decedent or his estate, whether owed to the heirs of his deceased spouse or otherwise. In addition, as explained above, First Spouse and her heirs have no property interest whatsoever in *survivor* annuity benefits payable to Surviving Spouse.

in the property for which an accounting is sought. But, again, the Sons cannot have acquired such a prerequisite interesst in these retirement benefits because ERISA's spendthrift provisions interdict absolutely any attempted alienation that is not in "qualified" form. Even a cursory reading of the requirements for qualifying as a QDRO reflects that neither intestate nor testamentary transfers can qualify. I thus believe that, as a matter of law, the premise on which the Sons' cause of action is based, i.e., one transfer from their mother to their father and a second, contemporaneous transfer from her to them, is non-existent.[70]

I therefore find inescapable the conclusion that ERISA's anti-alienation provision preempts those provisions of Louisiana community property law that are pertinent to this decision. As such, ERISA's proscription of transfer functioned to prevent the Sons — and, for that matter, Participant — from obtaining from First Spouse, by testament or otherwise, any interest in the share of the community's putative interest in Participant's retirement plan or its benefits claimed by the Sons. To reach this conclusion, I had to determine which law prevails, ERISA's "spendthrift" canon or Louisiana's community property law. In giving the nod to ERISA, I plainly recognize its preemptive effect. When, as here, some aspect of state law "relates to" an ERISA plan — particularly when it directly conflicts with a key provision of ERISA, such as anti-alienation — the latter trumps by virtue of preemption. Only through the terrible swift sword of preemption is the

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[70] Proponents of the Sons' position contend that, because a spendthrift provision generally ceases to shield funds after they have been distributed from the trust, no violation of this provision has occurred in the instant case. This reasoning in unconvincing. The Sons claims are inextricably tied to an attempted alienation of the benefits at a time when those benefits remained in the plan and could not be alienated. These claims are readily distinguishable from those of a creditor against the distributed benefits that are unrelated to an asserted ownership claim of the benefits themselves.

frustrating of Congress's announced goals trampled.

The QDRO is an exception to both statutory preemption in general and to anti-alienation in particular. It is therefore not surprising that both provisions are apposite to this case. Given both the posture of this case and its importance, however, I do not rest my conclusion exclusively on the anti-alienation provision. Assuming, but certainly not conceding, that the anti-alienation provision alone might not preclude the Sons' asserted cause of action, I remain convinced that the express statutory preemption provision surely does.

5. *Civilian Sanctity Does Not Compel A Different Result*

Louisiana's community regime is a time-honored Civilian institution; it is not, for example, the result of a belated effort of a common law state to obtain some federal tax advantage or parity. Notwithstanding the venerability of Louisiana's community property law and the implication of public policy that others might argue are embodied in some facets of that regime, I observe that in other areas of its private law, which are equally steeped in tradition and intertwined with public policy, Louisiana has carved out exceptions for ERISA-qualified employee benefit plans. For example, qualified plans are found on Louisiana's list of property that is exempt from claims of creditors in bankruptcy.[71] A more instructive example is found in the law of forced heirship, under which the decedent's interest in a qualified plan is exempt from claims of forced heirs[72] despite the fact that, at least until quite recently, no Civilian cow was more

[71] La. Rev. Stat. Ann. §13:3881 (D).

[72] La. Civ. Code Ann. art. 1505.

sacred in Louisiana.[73] Admittedly, there are distinguishing differences between these examples and the instant case, but they serve to illustrate that even under the Civil Law of Louisiana, ERISA-covered employee benefit plans are recognized as being *sui generis* and are frequently treated as such.[74]

But most of all, I cannot ignore the mandate of the federal statute, the intent of Congress, and the purposes and structure of ERISA. I therefore would have had this court conclude that ERISA — its expressed purposes and its particular provision against alienation — preempts Louisiana community property law to the extent that such law would recognize and enforce a probate interest of the heirs or legatees of a predeceased nonparticipant spouse in an ERISA-qualified pension plan. To hold otherwise would seem to frustrate ERISA's ultimate purposes of providing nationally uniform governance of employee benefit law and ensuring receipt of retirement benefits by participating employees and their dependants.

6. *No "End Runs" to Defeat the Effects of Preemption*

The Sons sought — and have now obtained — a result

[73] *See* La. Const. art. XII, § 5 (amended 1995) ("[n]o law shall abolish forced heirship."); *Succession of Lauga*, 624 So.2d 1156 (La. 1993) (declaring legislative revamping of forced heirship law unconstitutional). *But see* La. Const. art. XII § 5 (effective November 23, 1995) (removing constitutional protection for forced heirship except for children under 23 years of age or disabled).

[74] Neither can I ignore the purely suppletive, non-mandatory nature of Louisiana's community property regime. Both before and during the marriage, a couple is entitled to select the marital property regime of their choice, including not only the community regime but also, inter alia, a regime of separate property that is essentially identical to the common law system. *See* La. Civ. Code Ann. art. 2336. I question just how sacrosanct a purely optional property system can be.

that is the equivalent of a decree of ownership of retirement benefits under an ERISA plan. In a thinly veiled effort to get around ERISA's anti-alienation bar, the Sons argue that an accounting, with recovery in the form of a money judgment, does not violate anti-alienation because the judgment would be payable from funds that have been distributed and commingled with other assets, and therefore no longer protected by the spendthrift provisions's shield.

I have already demonstrated why such a result cannot be achieved by direct means: ERISA's anti-alienation provisions render nugatory the First Spouse's purported transfer of "her" community interest in the Bell Plan benefits. Anti-alienation thus interdicts any efforts by the Sons to compel a plan administrator to turn over to the Sons directly a portion of the benefits, simply by virtue of their status as heirs of a nonparticipant spouse.[75] And, I have also demonstrated that ERISA's preemption will enforce anti-alienation over the laws of the state that are here at work. I am satisfied that permitting the sons to achieve the results they desire by *indirect* means is likewise proscribed.

In other federal preemption contexts, the courts have stricken efforts to employ indirect means to circumvent or undermine federal law.[76] In the context of United States bonds, the Supreme Court stated that "[i]f the State can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the State has interfered directly with a legitimate exercise of the power of the Federal Government

[75] *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

[76] *See Free v. Bland*, 369 U.S. 663 (1962) (holding that federal law creating a right of survivorship in United States Savings Bonds registered in co-ownership form preempted Texas community property law).

to borrow money."[77] Relying on that reasoning by analogy, at least one district court has recognized that what ERISA prohibits directly cannot be accomplished indirectly.[78] The extraordinary protections and policies embodied in ERISA could be emasculated to the point of impotence were they so easily circumvented by enforcing indirectly otherwise preempted claims or prohibited alienations under the guise of an accounting action or claim of inheritance rights against the plan beneficiary, or eventually the plan's fiduciary.

CONCLUSION

Based on the foregoing reasons, I am firmly convinced that ERISA preempts Louisiana community property law to the extent that such law would purport to recognize and enforce an interest of the heirs of a nonparticipant spouse in an ERISA-qualified pension plan. Whether the en banc court would have reached this same conclusion cannot be said. What can be said, however, is that the magnitude and importance of the issue presented by this case made it worthy of review by the entire court. I regret that a majority of my colleagues did not see it this way; that is why I respectfully dissent from the decision not to rehear this most important case en banc.

[77] *Id.* at 669.

[78] *Meeks v. Tullis*, 791 F.Supp. 154, 157 (W.D. La. 1992) (holding that a claim by the heirs of a nonparticipant spouse against non-ERISA assets for the value of the community propery interest is preempted because to allow this claim would little different than allowing a claim to the ERISA assets, which is prohibited).

(3)

Supreme Court, U.S.
FILED
OCT 2 1996
CLERK

No. 96-79

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS,

Petitioner,

v.

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OPPOSITION OF HARRY M. BOGGS, AND DAVID B. BOGGS TO PETITION BY SANDRA JEAN DALE BOGGS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER REVIEW ON WRIT OF CERTIORARI IS APPROPRIATE WHERE:

1. The District Court did not hold any evidence to be inadmissable.

2. No real conflict exists with any decision of this Court or of other circuits.

3. The issue involved is whether in this particular case the evidence presented in opposition to the holding of the District Court and the Fifth Circuit Court of Appeal is sufficient to require the issuance of a Writ of Certiorari.

LIST OF PARTIES

1. SANDRA JEAN DALE BOGGS, Petitioner

   Represented by Livaudais & Livaudais

2. THOMAS F. BOGGS, Respondent

   In Proper Person

3. HARRY M. BOGGS AND DAVID B. BOGGS , Respondents

   Represented by Deano & Deano

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No. 96-79

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SANDRA JEAN DALE BOGGS,
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ON PETITION FOR WRIT OF CERTIORARI
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OPPOSITION OF HARRY M. BOGGS, AND
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SANDRA JEAN DALE BOGGS
FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

We have no problem with the statement of the case in petitioner's brief and as stated in the Reasons for Judgment of the District Court and the Opinion of the Fifth Circuit Court of Appeals.

We do however deny that there is a conflict between the holding of the Ninth Circuit in Ablamis v. Roper, 937 Federal Reporter 2nd 1450 and the holding of the Fifth Circuit in this matter because the causes of action are different. In Ablames, the Trustee of profit sharing trusts brought a declaratory judgment against the Executor of Glee Ann Ablamis. In the Boggs case all distribution of retirement funds have been paid to the employee and his designated beneficiary.

We have strong differences with the conclusion of petitioner in his Petition For Writ of Certiorari in that:

1. The entire ERISA law is directed toward employees and administrators of the retirement trusts in order to protect the interest of the employee. Nowhere is the entire act does it attempt to regulate ownership of retirement funds as between members of a family nor does the ERISA provisions attempt to control the ownership of the funds after receipt by the employee or his beneficiary as set out in the laws of the State of residence and/or domicile of the employee or his beneficiary.

2. In the appendix to the petitioner's petition is cited 29 USC 1132 - Civil Enforcement. This section sets out Persons empowered to bring a civil action. Nowhere in this section does the law mention an action by a beneficiary against a forced heir of the employee.

ARGUMENT

We believe that the District Court correctly stated the law in its foot note #1 on page 5 of the Reasons For Judgment quoted in petitioner's appendix to the Petition marked "A-1".

The District Court's Reasons For Judgment on page 6 states:

"In enacting ERISA, Congress declared that its policy was the protection of employees vis a vis their employers --- The Act does not display any particular interest in preserving maximum benefits to any particular beneficiary".

And on page 10 of the District Court's Reasons for Judgment is:

"Secondly, because Louisiana law provided Dorothy Boggs with an undivided interest in the retirement plans at the time the fund was established, which was well before ERISA was passed in 1974, allowing ERISA to preempt her estate created property right would violate the Fifth Amendment's prohibition against the government's taking private property without just compensation"--.

Further more we do not feel that we can speak or argue more forcefully than the holding of the Court of Appeals for the Fifth Circuit. On page A-21 of petitioner's petition the Court states:

"This Court concludes that, under the facts of the case, the Louisiana community property law is not sufficiently 'related to' an employee benefit plan to necessitate ERISA preemption. Nothing is sought from the plan or its fiduciary. No duty will be imposed on the plan or the administrator. Benefits will continue to be paid to the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects 'employee benefit plans' in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan. 21 Our decision relates not to the plan but to the disposition of the

proceeds only after payment to the designated beneficiary. This is no greater effect than the state's garnishment laws. Mackey, 486 US 825 (1988)."

The holding of the Fifth Circuit failed to follow the reasoning of the Ablamis case for reasons stated on Page A-24, A-22 and A-23. We add that the Ablames case was brought about by a trustee of two profit sharing trusts seeking a declaratory judgment of the Court as to whom to pay the proceeds of the plans - the employee's stated beneficiary or the heirs of the first wife.

In our case the funds are being paid to the employee's designated beneficiary, so the administrator of our fund is following the holding of the Ablamis case. But here, we are seeking the following the law of Louisiana, not as it applies to the retirement or investment plan, but as the Louisiana laws of ownership of community property apply to the funds after they are received by the beneficiary.

We had previously objected to the removal of our case in the State Court to the Federal Court by objecting to the jurisdiction. Maybe that was the wrong term. Our position was brought about mainly by the holding of the Court in Metropolitan Life Insurance Co. v. Taylor, 481 US 58. This was an action between an employer and an employee. The original suit was filed in the State Court by the employee and General Motors the employer and Metropolitan the administrator of the trust fund removed the matter to the Federal Court. In this case the court held that because this was a suit by a beneficiary to recover benefits from a covered plan, it falls directly under Section 502 (a) (i) (b) of ERISA which provides an exclusive federal cause of action for resolution of such disputes. As such the action was governed

by Section 502 (a) i (b) because of its civil enforcement provision. The civil enforcement provision of ERISA are covered in 29 USC 1132. (a) allows a civil action be brought by:

(1) A participant or beneficiary - (A) for the relief provided for in subsection (c) or (B) to recover benefits due him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. Subsection "C" deals with an administrator's refusal to supply sufficient information and the failure to provide annual reports in complete form.

In Metropolitan the Court held its exclusive jurisdiction only because the civil enforcement provision of ERISA. We cannot find any need for civil enforcement of ERISA in our case. All payments under the plans have been paid to petitioner and are still being paid to her. She nor the sons of Isaac Boggs, Jr. are opposed to the method of payment by the administrator of the retirement plan.

Judge King who was on the panel in the Fifth Circuit dissented in the original opinion. She later moved for an En Banc Hearing which was refused by the Court. From the refusal she wrote a 37 page dissent which has been filed by petitioner as a supplemental appendix.

After reading Judge King's dissent over four times and reading most of the cases cited we do not feel that the dissent brings anything new to this matter. Her conclusion is that the ERISA preemption is all inclusive. It differs from the holding of the majority which stated: "In other words, ERISA was not meant to consume everything in its path".

In two places she cites Meeks v. Tullis, 791 F. Supp. 154, 157 (WD La. 1992). The facts of the Meeks case are quite similar to the facts of our case. It was heard by a Magistrate who stated that the attorney for Meeks made no effort to justify their position except to quote from the dissent in the Ablamis case. The author of this brief called the attorney to ask why he did not make greater effort to establish his position and why he did not appeal. He stated that this client did not believe that it was worth the effort and did not desire to assume the cost of an appeal. We do not believe that the Meeks case should be considered by the Court especially in view of the Fifth Circuit's decision here.

For the above stated reasons respondents feel that there is no error in the holdings of the District Court or the Fifth Circuit Court of Appeals and no Writ of Certiorari should issue.

RESPECTFULLY SUBMITTED:

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(4)

Supreme Court
FILED
DEC 3 1996
CLERK

NO. 96-79

In the
Supreme Court of the United States

OCTOBER TERM 1996

SANDRA JEAN DALE BOGGS,
Petitioner

VERSUS

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 11, 1996
CERTIORARI GRANTED NOVEMBER 1, 1996

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed
APR 17 1996

No. 94-30178

D. C. Docket No. CA-92-4174-D

SANDRA JEAN DALE BOGGS,
Plaintiff-Appellant,

Versus

THOMAS F. BOGGS, HARRY P. BOGGS,
AND DAVID B. BOGGS,
Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana, New Orleans

Before WISDOM, KING, and DUHE', Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

KING, Circuit Judge, dissents:

ISSUED AS MANDATE: Aug 2, 1996

A True Copy
Test
Clerk, U.S. Court of Appeals,
Fifth Circuit

/s/ By C.M. Broadhead
Deputy
New Orleans, Louisiana
Aug 2 1996

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
MAR 10 1994

SANDRA JEAN BOGGS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-4174
	*	
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

JUDGMENT

For the reasons set out in this court's Minute Entry dated March 9, 1994;

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be entered herein in favor of Defendants, Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, and against Plaintiff, Sandra Jean Boggs, DECLARING that ERISA, 29 U.S.C. § 1001 *et seq.*, does not preempt Louisiana's community property law.

New Orleans, Louisiana, this 9th day of March, 1994.

/s/ illegible
UNITED STATES
DISTRICT JUDGE

DATE OF ENTRY MAR 10, 1994

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 92-CV-4174
Filed: 12/17/92

Boggs v. Boggs, et al
Assigned to: Judge A.J. McNamara
Demand: $0,000 Nature of Suit: 791
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2201 Declaratory Judgement

SANDRA J. BOGGS plaintiff	James Frederick Willeford (504) 582-1280 [COR LD NTC] Attorney at Law 201 St. Charles Ave. Suite 3701 - Place St. Charles New Orleans, LA 70170-3701 (504) 582-1280
	Marian Mysing Livaudais [COR NTC] Livaudais & Livaudais 3500 Hwy. 22 First Bank Place, Suite 200 Mandeville, LA 70448 (504) 626-1144

v.

Thomas F. Boggs defendant	Jimmy N. Dimos [term 04/02/93] (318) 388-4303 [COR LD] Dimos, Brown, et al 1216 Stubbs Ave. P. O. Drawer 2837 Monroe, LA 71207 (318) 388-4303
	Thomas F. Boggs [COR LD NTC] [PRO SE] Route 4. 229 Westlake Monroe, LA 71203 (318) 665-4448
HARRY P. BOGGS defendant	Guy L. Deano, Jr. (504) 626-1001 [COR LD NTC] Deano & Deano 895 Park Ave. P. O. Box 1210 Mandeville, LA 70470 (504) 626-1001
DAVID B BOGGS defendant	Guy L. Deano, Jr. (See above) [COR LD NTC]

MONDAY, OCTOBER 13, 1993 9:00AM
NON JURY TRIAL:
Trial taken on Briefs:

DATE OF ENTRY OCT 22 1993

MINUTE ENTRY
McNAMARA, J.
SEPTEMBER 28, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
SEP 28 1993

SANDRA DEAN DALE BOGGS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-4174
	*	
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

On this date, the court held a telephone conference in the above captioned matter with the following persons: Attorneys James Willeford and Marian Livaudais represented Plaintiff, Sandra Boggs; Defendants, Harry and David Boggs, were represented by Guy Deano, Jr.; and Thomas Boggs, Defendant, appeared pro se.

All parties informed the court that this matter will be tried with stipulated facts and that they will submit a joint stipulation of facts, signed by all parties, to the court by October 13, 1993. All parties further agreed that any additional motions and/or memoranda shall also be filed by October 13, 1993, whereon the court will take the matter under advisement and try same with stipulated facts.

* * * * * *

DATE OF ENTRY SEP 28 1993

MINUTE ENTRY
McNAMARA, J.
SEPTEMBER 3, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
SEP 3 1993

SANDRA DEAN DALE BOGGS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-4174
	*	
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

All Parties are hereby advised of the following:

(1) There will be a telephone conference in this matter between the court and counsel for all Parties and any Party who is proceeding in Proper Person on Tuesday, September 28, 1993 at 10:30 a.m..

(2) The Pre-Trial Conference scheduled for Monday, October 4, 1993 has been moved to Wednesday, October 13, 1993 at 10:30 a.m..

(3) Plaintiff's Motion for Summary Judgment will be heard on Wednesday, October 6, 1993 at 9:00 a.m., AND

(4) All oppositions to Plaintiff's Motion for Summary Judgment must be received by this court before noon on Friday, October 1, 1993.

* * * * * *

DATE OF ENTRY SEP 3 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
APR 2 1993

SANDRA DEAN DALE BOGGS	CIVIL ACTION
VERSUS	NO. 92-4174
THOMAS F. BOGGS, HARRY T. BOGGS AND DAVID B. BOGGS	SECTION "D"
	MAGISTRATE DIVISION 3

JOINT MOTION FOR WITHDRAWAL OF COUNSEL

The joint motion of **THOMAS F. BOGGS,** a defendant in the above entitled and numbered cause, and his attorney, **J. N. Dimos,** and on suggesting to the Court that Thomas F. Boggs no longer desires to have J. N. Dimos represent him and that he desires to represent himself, and that he has been furnished with all information concerning deadlines and pending court appearances, as well as a copy of the pretrial order dated February 18, 1993, the attached pretrial notice; that he receives correspondence at Route 4, 229 Westlake, Monroe, LA 71203; and may be called on the telephone at 318/665-4448 or 318/388-8474; and, accordingly, movers desire that this Court issue an order allowing J. N. Dimos to withdraw from this matter, and that the clerk make an entry in the record showing that Thomas F. Boggs will hereinafter represent himself.

Respectfully submitted,

DIMOS, BROWN, ERSKINE & BURKETT
1216 Stubbs Avenue
Monroe, LA 71201
318/388-4303

/s/ J.N. Dimos
J. N. Dimos

/s/ Thomas F. Boggs
Thomas F. Boggs, In Proper Person

DATE OF ENTRY APR 6 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SANDRA DEAN DALE BOGGS	**CIVIL ACTION**
VERSUS	**NO. 92-4174**
THOMAS F. BOGGS, HARRY T. BOGGS AND DAVID B. BOGGS	**SECTION "D"**
	MAGISTRATE DIVISION 3

ORDER

Considering the above and foregoing Motion:

IT IS ORDERED that **J. N. DIMOS** is hereby allowed to withdraw from the above entitled and numbered matter as counsel for Thomas F. Boggs, and that the Clerk of Court make an entry in the record showing that **THOMAS F. BOGGS** will hereinafter represent himself and may receive correspondence and telephone calls as shown in the foregoing motion.

New Orleans, Louisiana, this 5th day of April, 1993.

/s/ illegible
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Joint Motion for Withdrawal of Counsel and accompanying Order were served on all counsel of record in this proceeding by placing same in the United States mail, postage prepaid and properly addressed to each at their respective addresses.

Monroe, Louisiana, this 22nd day of March, 1993.

/s/ J. N. Dimos
J. N. Dimos

MINUTE ENTRY
McNAMARA, J.
FEBRUARY 18, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
2-18-93

SANDRA BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS BOGGS, ET AL	*	SECTION "D"

A Preliminary Conference was held by Telephone in the above captioned matter on this date.

PRESENT: JAMES WILLEFORD, ATTORNEY FOR PLAINTIFF
DAVID BURKETT, GUY DEANO, JR., ATTORNEY FOR DEFENDANT

Jurisdiction and venue are established.

Amendments to pleadings, counterclaims, cross-claims and third party complaints will be filed within 30 days. This provision sets deadlines only. you must seek leave of court if required by rule.

Pleadings responsive thereto, when required, shall be filed within the applicable delays therefor.

Counsel adding new parties subsequent to mailing of this Notice shall serve on each new party a copy of this Minute Entry.

DATE OF ENTRY FEB 18 1993

Written reports of experts who may be witnesses for Plaintiff shall be obtained and delivered to counsel for Defendant as soon as possible, but in no event later than 90 days prior to Pre-Trial Conference date.

Written reports of experts who may be witnesses for Defendant shall be obtained and delivered to counsel for Plaintiff as soon as possible, but in no event later than 60 days prior to Pre-Trial Conference date.

Counsel for all parties shall file in the record and serve upon their opponents a list of all witnesses who may or will be called to testify at trial not later than 60 days prior to Pre-trial Conference date.

All discovery and any deposition taken for the purpose of perpetuation shall be completed not less than 30 days proir to Pre-Trial Conference date.

The court will not permit any witness, expert or fact, to testify unless there has been compliance with this Order as it pertains to the witness.

All pre-trial motions will be filed so as to be noticed for a Motion day not less than 30 days prior to the date fixed for the Pre-Trial Conference.

A final Pre-Trial Conference will be held before the District Judge on *MONDAY, OCTOBER 4, 1993 AT 1:15 PM,* The Pre-Trial Order, *in duplicate,* must be delivered to the Court's Chambers by 4:30 p.m. on a day that allows one full work day prior to the Conference, excluding Saturdays, Sundays, and holidays (i.e., if the Conference is set for

10:00 a.m. Friday, it must be delivered by 4:30 p.m. Wednesday. If the Conference is set on Monday, the Pre-Trail Order will be delivered to the Judge on Thursday by 4:30 p.m.). *All Pre-Trial Orders must bear the signatures of all counsel at the time they are so submitted.*

Trial will commence during the week beginning *MONDAY, OCTOBER 18, 1993 AT 9:00 AM,* before the District Judge *WITHOUT* a jury. Attorneys are instructed to report for Trial *not later than 30 minutes prior to this time.* The starting time on the first day of a jury trial may be delayed or moved up one hour because of jury pooling. Trial is estimated to last *ONE* day(s). Deadlines or cutoff dates fixed herein may only be extended by the Court upon timely application and upon a showing of good cause.

* * * * *

/s/ illegible

MINUTE ENTRY
McNAMARA, J.
FEBRUARY 3, 1993

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
FEB 3 1993

SANDRA DEAN DALE BOGGS	*	CIVIL ACTION
	*	
VERSUS	*	NO. 92-4174
	*	
THOMAS F. BOGGS, HARRY P. BOGGS and DAVID B. BOGGS	*	SECTION "D" (3)

Before the court is the Motion of Defendants to Dismiss for Lack of Jurisdiction. Plaintiff has filed an opposition. The matter is before the court on briefs, without oral argument.

Defendants argue that this court lacks subject matter jurisdiction over the declaratory judgment action brought by Plaintiff. They deny that the matter involves an interpretation of the Employee Retirement Income Security Act of 1974 (ERISA). This court finds, however, that the scope of ERISA is at the heart of this matter. Accordingly;

IT IS ORDERED that the Motion to Dismiss for Lack of Jurisdiction be DENIED.

/s/ illegible

DATE OF ENTRY FEB 3 1993

APPEAL TERMED
MAG-3

U. S. District Court
USDC for the Eastern District of Louisiana (New Orleans)
CIVIL DOCKET FOR CASE #: 92-CV-4174

Boggs v. Boggs, et al Filed:12/17/92
Assigned to: Judge A.J. McNamara
Demand: $0,000 Nature of Suit: 791
Lead Docket: None Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2201 Declaratory Judgment

SANDRA JEAN BOGGS
plaintiff

James Frederick Willeford
(504) 582-1280
[COR LD NTC]
Attorney at Law
201 St. Charles Ave.
Suite 3701 - Place St. Charles
New Orleans, LA 70170-3701
(504) 582-1280

Marian Mysing Livaudais
[COR NTC]
Livaudais & Livaudais
3500 Hwy. 22
First Bank Place, Suite 200
Mandeville, LA 70448
(504) 626-1144

v.

Thomas F. Boggs
defendant

Jimmy N. Dimos
[term 04/02/93]
(318) 388-4303
[COR LD]
Dimos, Brown, et al
1216 Stubbs Ave.
P. O. Drawer 2837
Monroe, LA 71207
(318) 388-4303

Thomas F. Boggs
[COR LD NTC] [PRO SE]
Route 4, 229 Westlake
Monroe, LA 71203
(318) 665-4448

HARRY P. BOGGS
defendant

Guy L. Deano, Jr.
(504) 626-1001
[COR LD NTC]
Deano & Deano
895 Park Ave.
P. O. Box 1210
Mandeville, LA 70470
(504) 626-1001

DAVID B BOGGS
defendant

Guy L. Deano, Jr.
(See above)
[COR LD NTC]

Docket as of April 11, 1994 2:03 pm

April 11, 1994

Proceedings include all events. APPEAL
2:92cv4174 Boggs v Boggs, et al TERMED MAG-3

Sandra Jean Boggs
Plaintiff

v.

Thomas F. Boggs; Harry P Boggs; David B Boggs
defendant

12/17/92 1 COMPLAINT (3 summons(es) issued) (msm)

12/17/92 — Payment of filing fee by plaintiff Sandra Jean Boggs in amount of $ 120.00 (msm)

12/23/92 2 Ntc & ack of RETURN OF SERVICE of S&C executed upon defendant Harry P Boggs on 12/21/92 (js)
[Entry date 12/24/92]

12/28/92 3 RETURN OF SERVICE/NTC OF ACKNOWLEDGEMENT of S & C executed upon defendant David B Boggs on 12/24/92 (rg)

1/11/93 4 ANSWER by defendant Thomas F Boggs to orig complaint by plaintiff Sandra Jean Boggs [1-1] (js)

1/11/93 5 Ntc & acknowledgment for RETURN OF SERVICE of S&C executed upon defendant Thomas F Boggs on 12/23/92 (js)

1/13/93 6 ANSWER by defendants Harry P Boggs & David B Boggs to orig complaint by paintiff Sandra Jean Boggs [1-1] (js)

1/13/93 7 MOTION by defendants Harry P Boggs & David B Boggs to dismiss for lack of jurisdiction. To be heard before Judge at 9:00 2/3/93 (js)

1/25/93 8 Memo in opposition by plaintiff Sandra Jean Boggs to motion to dismiss for lack of jurisdiction [7-1] filed by defendants Harry P Boggs & David B Boggs (js)

2/3/93 9 MINUTE ENTRY (2/3/93): ORDER denying the motion of dfts Harry Boggs & David Boggs to dismiss for lack of jurisdiction. [7-1] by Judge A. J. McNamara (js)

2/4/93 10 NOTICE that a preliminary conference is scheduled before Courtroom Deputy by phone at 11:15 2/18/93 (js)

2/18/93 11 MINUTE ENTRY (2/18/93): Preliminary Conference held this date. Amendments due w/in 30 days. Final pretrial conf is set for 1:15 10/4/93 & non-jury trial is set for 9:00 10/18/93. by Judge A.J. McNamara (js)

4/2/93 12 Motion by defendant Thomas F Boggs and ORDER withdrawing attorney Jimmy N. Dimos as counsel of record. by Judge A. J. McNamara Date Signed: 4/5/93 (js) [Entry date 04/06/93]

8/3/93 13 Exhibit list by plaintiff Sandra Jean Boggs (js)

8/3/93 14 Witness list submitted by plaintiff Sandra Jean Boggs (js)

8/6/93 15 Request by plaintiff Sandra Jean Boggs for admissions (first set) (js) [Entry date 08/09/93]

8/27/93 16 MOTION by plaintiff Sandra Jean Boggs for summary judgment To be heard before Judge at 9:00 9/15/93 (js)

9/3/93 17 MINUTE ENTRY (9/3/93): ORDERED that a Status Conf by phone w/Judge will be held 10:30 9/28/93. Further the Pre-Trial Conference is moved to 9:00 10/6/93. Pla's motion for summary judgment [16-1] is cont to 9:00 10/6/93 & opps to this mtn is due by 10/1/93 12:00noon. by Judge A.J. McNamara (js)

9/28/93 18 MINUTE ENTRY (9/28/93): Status Conf w/Judge held this date. All ptys informed Court that this matter will be tried w/stipulated facts & they will submit a joint stip of facts by 10/13/93. All ptys further agreed that any addl mtns or memos shall be filed by 10/13/93 & Court will take matter under advisement & try same w/stip facts. by Judge A. J. McNamara (js)

10/8/93 19 Memorandum by defendant Harry P Boggs, defendant David B Boggs in support M.E. re Status Conf w/Judge held w/Judge. Stipulation of facts. addl mtns or memos shall be filed by 10/13/93 & Court will take matter under advise-

ment & try same w/stip facts. [18-1], of minute entry [18-2] (rg)

10/13/93 20 Reply Memorandum by plaintiff Sandra Jean Boggs in support of her motion for summary judgment [16-1] (js)

10/13/93 21 Stipulation of facts by plaintiff Sandra Jean Boggs (js)

10/13/93 22 PROCEEDING: Non-jury trial Case decision taken under advisement. by Judge A.J. McNamara (js)
[Entry date 10/22/93]

3/10/94 23 MINUTE ENTRY (3/9/94): ORDER denying pla's motion for summary judgment [16-1] which seeks a declaration that ERISA preempts LA community prop laws. Further that jgm be rendered in favor of dfts' declaring that ERISA does not preempt LA community prop laws. by Judge A.J. McNamara (js)

3/10/94 24 JUDGMENT: In favor of dfts' & agst pla declaring that ERISA does not preempt LA community prop law. by Judge A. J. McNamara Date signed: 3/9/94 (CASE CLOSED) (js)

Proceedings include all events. APPEAL
2:92cv4174 Boggs v. Boggs, et al TERMED MAG-3

3/22/94 25 Notice of appeal by plaintiff Sandra Jean Boggs from Dist. Court decision entered 3/10/94. (js)

3/24/94 — Payment of appeal fee by plaintiff Sandra Jean Boggs in amount of $ 105.00 (js) [Entry date 03/25/94]

4/1/94 26 Transcript order by appellant Sandra Jean Boggs - not necessary for appeal purposes. (js) [Entry date 04/05/94]

Docket as of April 11, 1994 2:03 pm

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
MAR 22 1994

SANDRA JEAN DALE BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, ET AL	*	SECTION "D" (3)

* * * * * * * * * * *

NOTICE OF APPEAL

Notice is hereby given that Sandra Jean Dale Boggs, plaintiff above named, hereby appeals to the Court of Appeals for the Fifth Circuit from the Minute Entry of March 9, 1994 and final Judgment entered in this action on March 10, 1994.

Respectfully submitted,

LIVAUDAIS & LIVAUDAIS

/s/ Marian M. Livaudais

MARIAN M. LIVAUDAIS (SCBR #8636)
Attorney for Plaintiff
Suite 200, First Bank Place
3500 Highway 190
Mandeville, Louisiana 70448
Telephone (504) 626 1144

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Notice of Appeal has been duly served upon all counsel of record by depositing a copy of the same in the United States Mail, properly addressed, postage prepaid, this 18th day of March, 1994.

/s/ Marian M. Livaudais

MARIAN M. LIVAUDAIS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Filed
OCT 13 1993

SANDRA JEAN DALE BOGGS	*	CIVIL ACTION
VERSUS	*	NO. 92-4174
THOMAS F. BOGGS, HARRY P. BOGGS and DAVID B. BOGGS	*	SECTION "D"
	*	MAG. DIV. 3

STIPULATION OF FACTS

The parties hereto stipulate to the following facts:

1. Isaac E. Boggs, Jr. died February 16, 1989 leaving a Last Will and Testament.

2. He is survived by his widow, Sandra Jean Dale Boggs, the plaintiff in this matter, and three sons, Thomas Frank Boggs, Harry Maurice Boggs, and David Bruce Boggs, the defendants in this case.

3. His succession was opened under No. 89-30055 of the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, and Sandra Jean Dale Boggs was confirmed as Testamentary Executrix in that proceeding.

4. Isaac E. Boggs, Jr. was married first to Dorothy McDonald Boggs, who died on August 14, 1979.

5. Under Dorothy Boggs' will, Isaac E. Boggs, Jr. was left one-third of her estate and the lifetime usufruct of the remaining two-thirds of her estate which was inherited by her three children, Thomas Frank Boggs, Harry Maurice Boggs and David Bruce Boggs.

6. Dorothy Boggs' succession was opened under No. 8627 of the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, and a Judgment of Possession was signed on February 5, 1980.

7. The Sworn Descriptive List of asserts filed in Dorothy Boggs' succession included the Bell Systems Savings Plan for Salaried Employees with a value of $42,388.57 at the time of her death; Dorothy's one-half interest was valued at $21,194.29. Bell Systems provided the value of the Savings Plan as of Dorothy Boggs' death.

8. Isaac E. Boggs, Jr. married Sandra Jean Dale Boggs on April 5, 1980, and no children were born of their marriage.

9. Isaac E. Boggs, Jr. was employed by South Central Bell Tel & Tel from June 18, 1949 until September 1, 1985, when he retired or a period of thirty-six years and two months.

10. He was married to Dorothy McDonald Boggs from the date of his employment on June 18, 1949 until her death on August 14, 1979.

11. Upon his retirement he received the sum of $151,628.94 which was the distribution from the BellSouth Management Savings Plan, (formerly called BellSouth Systems Savings Plan for Salaried Employees) and all of these funds were "rolled over" into an IRA account at Delaware Charter Guarantee Trust Co.

12. He made no withdrawals from the IRA account prior to his death. At the date of his death this account was $180,778.05.

13. In addition to the distribution from the Savings Plan, he received monthly retirement payments from September 1, 1985 through the date of his death on February 16, 1989 in the amount of $1,777.67 per month.

14. Thereafter the survivor's lifetime annuity pension has been paid to his widow, Sandra Jean Dale Boggs, and she was named as the beneficiary of the IRA plan.

15. Under the terms of the BellSouth ESOP, Isaac Boggs acquired 96 shares in AT&T which were distributed to him when he retired.

16. In addition, the Plan included life insurance policies payable to Sandra Jean Dale Boggs as the named beneficiary.

17. The BellSouth Management Savings Plan, the ESOP Plan and all retirement benefits and employee benefit plans of South Central Bell Tel. & Tel are qualified plans subject to the provisions of The Employee Retirement Income Security Act of 1974 and The Retirement Equity Act of 1984.

18. The IRA account at Delaware is a qualified Individual Retirement Account under IRC Section 401, et seq.

19. Two of the defendants herein, Harry and David Boggs, have filed an action in the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, No. 92-14434, claiming that they are entitled to the following:

a. An accounting of the usufruct enjoyed by Isaac E. Boggs, Jr. over that portion of the retirement payments attributable to Dorothy Boggs' community interest in the retirement plan; payment of a percentage of the pension plan payments from September 1, 1995 through February 16, 1989.

b. A percentage of the survivor's annuity payable to Sandra Jean Dale Boggs from February, 1989, until her death.

c. A percentage of the IRA account which was created in the "roll over" of Isaac E. Boggs, Jr.'s distribution of the BellSouth Management Savings Plan, based on Dorothy Boggs' community interest in those funds.

d. A portion of the ESOP shares of AT&T stock.

20. On December 17, 1992, the Plaintiff filed her Petition for Declaratory Judgment in the captioned proceedings for the purpose of resolving the issue of whether ERISA preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under the Plan and/or the IRA.

Dated this 13 day of October, 1993.

/s/ James F. Willeford

JAMES F. WILLEFORD, T.A.
SCBR #13485
Attorney for Sandra Dale Boggs
201 St. Charles Ave., Ste. 3912
New Orleans, Louisiana 70170-3912
Telephone: (504) 582-1286

/s/ Guy L. Deano, Jr.

GUY L. DEANO, JR.
Attorney for Harry M. Boggs
and David B. Boggs
Bar Roll #4771
895 Park Avenue
Mandeville, Louisiana 70448
(504) 626-1001

/s/ Thomas F. Boggs

THOMAS F. BOGGS
IN PROPER PERSON
Route 4, Box 229 West Lake Drive
Monroe, Louisiana 70123

STIPULATION OF FACTS AND DOCUMENTS

Facts and documents to which the parties stipulate authenticity are listed as follows:

EXHIBITS:

A. Last Will and Testament of Isaac E. Boggs, Jr.

B. Letters Testamentary issued to Sandra Jean Dale Boggs.

C. Last Will and Testament of Dorothy McDonald Boggs.

D. Judgment of Possession filed in the Succession of Dorothy McDonald Boggs.

E. Sworn Descriptive List filed in the Succession of Dorothy McDonald Boggs.

F-1. Your Personal Statement of Benefits 1985 - South Central Bell.

F-2. BellSouth Management Pension Plan.

G. BellSouth Managment Plan Distribution and IRA information.

H. Pension Computation Sheet.

I. BellSouth ESOP information.

J-1. Petition for a Declaratory Judgment.

J-2. Amended Petiton for a Declaratory Judgment.

NOTE: Attachments to the Stipulation of Facts and Documents listed above can be found at Pages 50 through 73 of the Record

NO. 96-79

Supreme Court, U.S.
FILED
DEC 3 1996
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1996

SANDRA JEAN DALE BOGGS,
Petitioner

VERSUS

THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER ON THE MERITS

MARIAN MYSING LIVAUDAIS*
John Catlett Christian
F. Pierre Livaudais
3500 Highway 190, Suite 200
Mandeville, Louisiana 70471
Telephone: (504) 626-1144

James F. Willeford
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New Orleans, Louisiana 70170
Telephone (504) 582-1286

Attorneys for Petitioner

*Counsel of Record

PETITION FOR CERTIORARI FILED JULY 11, 1996
CERTIORARI GRANTED NOVEMBER 1, 1996

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

43 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 et seq., preempts states' community property laws that afford an inheritance right to heirs of a predeceased non-employee spouse of the pension plan participant to receive ERISA covered pension plan benefits (including those rolled over in an IRA) from the participant's estate and surviving spouse.

II.

Does ERISA preemption of states' laws extend to pension benefits 'rolled over' into an Individual Retirement Account under 26 U.S.C. 401, et seq.?

LIST OF PARTIES

The parties to this case are Petitioner, Sandra Jean Dale Boggs, Respondents, Thomas F. Boggs, Harry M. Boggs and David B. Boggs.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 82 F.3d 90 (5th Cir. 1996) and is reprinted in the Appendix to Petition for Certiorari at Cert. App. 13-25. The Dissenting Opinion of Judge Wiener to the refusal of the Fifth Circuit to grant a Rehearing En Banc is reported at 89 F.3d 1169, and is reprinted as Supplemental Appendix to Petition for Certiorari, ("Supp. App. H"). The opinion of the United States District Court for the Eastern District of Louisiana is reported at 849 F.Supp. 462 (E.D.La. 1994) and is reprinted at Cert. App. 1-12.

JURISDICTION

The Judgment of the Fifth Circuit Court of Appeals was entered on April 17, 1996. A Petition for a Writ of Certiorari was filed with the clerk of this Court on July 11, 1996, within 90 days of the entry of that judgment. The Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was granted on November 1, 1996. This Court has jurisdiction under 28 U.S.C. sec 1254 (1).

STATUTES INVOLVED

The relevant federal statutory provisions are:

Employee Retirement Income Security Act of 1974, ("ERISA"), particularly 29 U.S.C. §1001, 29 U.S.C. §1055(a), 29 U.S.C. §1056 (d) (1), and (d) (3) (A) (B), and 29 U.S.C. §1144(a), reproduced in Appendix "A" to this brief. 29 U.S.C. §1132 (a) (1) (B) and (e) (1), which are reported in the Appendix to Petition for Writ of Certiorari as App. "D", pp. A-28 - A-31.

Internal Revenue Code, 26 U.S.C. 408 (a) and (g), reproduced in the Appendix to Petition for Writ of Certiorari as App. "C", pp. A-26 & A-27.

The relevant Louisiana statutory provisions are Louisiana Civil Code, Articles 2335, 2336, and 2338, which are reproduced in the Appendix to the Petition for Writ of Certiorari as App. "E", pp. A-32 - A-34, and Louisiana Civil Code, Articles 2328, 2329, 2341 and 2356 which are reproduced in Appendix "B" to this brief.

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STATEMENT OF THE CASE

Petitioner, Sandra Boggs ("Sandra") is the second wife, and widow, of Isaac Boggs ("Isaac"), an employee of South Central Bell[1]. As an employee he participated in an ERISA-qualified pension plan. Isaac was first married to Dorothy Boggs ("Dorothy"), who died in 1979. Their children are David Boggs, Thomas Boggs and Harry Boggs, the respondents herein.

In 1980 Isaac married petitioner, Sandra.

Thereafter, in 1985 Isaac retired and became entitled to ERISA pension benefits. He received a lump sum pension payment valued at $151,628.94, which he rolled over into an IRA account and named his second wife, petitioner, as beneficiary under the plan and the IRA. He also received

[1]The Joint Stipulation of Fact, on which this case was tried, is reproduced in Joint Appendix, pp. 25-30.

shares of A.T. & T. stock, a life insurance policy, and a monthly annuity.

Upon his death in 1989 Isaac's annuity was converted into a survivor's annuity and is currently paid to his surviving spouse, petitioner.

Dorothy, Isaac's first wife, who died in 1979, bequeathed by testament one-third of her estate and a lifetime usufruct in the remaining two-thirds to her surviving husband, Isaac. She also bequeathed the naked ownership, or reversionary interest, in said two-thirds of her estate (subject to the usufruct) to her three sons, respondents herein.

Asserting that under Louisiana's community property laws their mother, Isaac's deceased first wife (Dorothy), had an interest in the pension plan, two of the Boggs' sons filed an action in the Louisiana state court seeking an accounting and a judgment against Sandra for an amount of money equal to Dorothy's alleged community (their deceased mother's) portion of the pension plan benefits.

Petitioner, Sandra, then filed this action in federal court, under 29 U.S.C. §1132 (a) (1) (B), and (e) (1), against the three Boggs' sons, seeking a declaratory judgment that: (a.) the Employee Retirement Income Security Act of 1974 ("ERISA") preempts the application of Louisiana's community property and succession laws to the assets of, or the benefits payable under the plan (including those benefits rolled over in the IRA), (b.) the community existing between Isaac and his first wife, Dorothy, has no interest in the assets or benefits payable under the pension plan benefits, and thus, (c.) the three Boggs sons as testamentary heirs of their mother,

Dorothy, have no interest in plan assets, or benefits, nor do they have a claim against petitioner, Sandra, for an amount equal in value to Dorothy's alleged community property interest in the plan benefits.

The district court held that ERISA does not preempt Louisiana's community property laws, because "they do not 'relate to' an employee benefit plan." (849 F.Supp. at p. 465)

The Fifth Circuit Court of Appeals, with one of the three judge panel dissenting, afirmed, holding that "under Louisiana community property law, each spouse owns 'a present undivided one-half interest' in all community assets, which vests from the moment of acquisition." * * * " 'ERISA's preemptive scope may be broad but it does not reach claims that do not involve the administration of plans, * * *' ". * * * "A spouse's accounting obligation under community property law affects employee benefit plans 'in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan' ". (82 F.3d at pp. 96,97) The appellate court then sought to justify its conclusions by the statement that: "Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary." (82 F.3rd at p. 97)

Further, notwithstanding the fact that the IRA consisted of plan benefits, the Fifth Circuit rejected application of the provision of 26 U.S.C. 408, which directs that an Individual Retirement Account is "for the exclusive benefit of an individual or his beneficiaries", and "[t]his section shall be applied without regard to any community property laws", with the statement that the statute "cannot reasonable be interpreted to intervene in the marital relationship and

divest one spouse of ownership rights." (82 F.3d at p. 98)

Subsequently, Fifth Circuit Judge Jacques Wiener requested a poll of all of the Fifth Circuit judges to rehear this case *en banc,* and upon failure to obtain a majority of the judges, filed a dissent, in which he was joined by the Chief Judge and four other judges of the Fifth Circuit. (89 F.3d 1169) -Pet. Cert. Supp. App. pp. A-42 - A-75.

SUMMARY OF THE ARGUMENT

Unless the Fifth Circuit decision is reversed, millions of American workers will retire to uncertainty as to their pension benefits they worked long years to receive, and many will be deprived of portions of those benefits.

Congress enacted ERISA as a comprehensive and exclusive system that regulates the creation and administration of employee pension benefit plans, and the distribution of plan benefits, without the necessity of looking to any outside source, or state law.

In order to ensure the uniform application of ERISA's provisions, Congress provided for the preemption of all state laws that relate to ERISA covered pension plans (29 U.S.C. §1144 (a)).

Congress also provided for non-alienation of the plan benefits (29 U.S.C. §1056(d) (1)), the only exception being the Qualified Domestic Relations Order (29 U.S.C. §1056 (d) (3) (A) and (B)), which does not apply here.

The Fifth Circuit Court of Appeals erred in holding that Louisiana's community property laws permit the heirs of a

pre-deceased spouse of a qualified employee benefit participant to recover from the plan's named beneficiary a portion of the benefits due the beneficiary on the theory that the benefits were community property of the pre-deceased spouse and subject to testamentary transfer by her. *Boggs v. Boggs,* 82 F.3d 90 (5th Cir. 1996)

The Fifth Circuit's decision is in direct conflict with the Ninth Circuit's decision in *Ablamis v. Roper,* 937 F.2d 1450 (9th Cir.1991) holding that ERISA preempts California's community property laws to the extent that they permit the testamentary disposition by the predeceased spouse of a portion of the named beneficiary's benefits.

The Fifth Circuit erroneously held that the plan benefits, which were rolled over into an IRA, are also subject to community property claims of the heirs of the deceased non-participant spouse.

ARGUMENT

I

ERISA - ITS PURPOSE

Congress created a comprehensive statutory scheme to provide employee benefits under qualified non-governmental retirement plans through the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Retirement Equity Act of 1984 ("REA"). ERISA designates the beneficiaries, controls and defines the pensions covered by the act, the eligibility or entitlement of the beneficiaries, the consequences of entitlement or vesting, the transmission of

pension benefits to participants, beneficiaries and alternate beneficiaries, and the restrictions on transferability of those benefits.[2] Protection of *participants* and *their beneficiaries* is the key to ERISA. As provided in subsequent sections of ERISA, the term *beneficiary* generally refers to the participant or the participant's spouse. As stated in §1001, the purpose of the Act is to protect the interest of participants in retirement benefits plans and their beneficiaries (their spouses). The Act achieves this by limiting the persons who may be beneficiaries and prescribing the benefits to which they may be entitled if they qualify. ERISA mandates that qualified pension plans provide a joint and survivors annuity for the participant and the participant's spouse. The only exception to this scheme is the designation of an alternate beneficiary named by both the participant and the participant's spouse[3]. Spousal consent to the naming of an alternate beneficiary is required, without exception, where the participant is married.

Nowhere does the Act speak of creating wealth for persons outside its ambit, such as children of the employee or of the employee's pre-deceased spouse. As a result of the limitations in the Act, only the participant and the participant's spouse are qualified beneficiaries under the Act.

The major federal purpose of ERISA is maintaining the

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[2] ERISA also governs the administration of qualified plans and the tax incentives and penalties relative to plans and benefits. The administrtion of benefit plans and the tax treatment of those plans are not subjects germane to this case.

[3] Ex-spouses and children may be alternate beneficiaries who may be afforded similar protection, but are not in anyway implicated in this case.

employee's financial security through a guaranteed income stream during retirement, and thereafter income to the employee's surviving spouse. 29 U.S.C. §1001

ERISA is a present day innovation in property law and provides a fair and equitable solution to a problem of today; i.e., providing for the financial security of today's retired workers and their spouses. This Court declared the regulation of private pension plans to be a substantial federal interest. *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41; 107 S.Ct. 1549; 95 L.Ed.2d 39 (1987).

To be effective as a federal program, such regulation must be uniformly applied in each of the 50 states. The preemption clause of ERISA plainly declares Congressional intent to prohibit the application of any law that would alter the scheme established in ERISA. 29 U.S.C. §1144 (a)

II.

ERISA PREEMPTS STATE LAWS WHICH RELATE TO EMPLOYEE BENEFIT PLANS

Without question, it is well settled that Congress' authority to exclusively occupy the field of private pension plans is grounded in the Commerce Clause through the Supremacy Clause of the U. S. Constitution.[4] This Court has recognized that authority in a number of cases. In the exercise of that authority, Congress included in ERISA, as section 514(a), a **preemption clause** by which the Act preempts the application of any state law that 'relates to' an ERISA

[4] *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 77 L. Ed. 2d 490 (1983)

covered pension plan. 29 U.S.C. §1144(a) It provides that, with certain named exceptions[5] (not pertinent here), the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * * " 29 U.S.C. §1144 (a)

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." * * * The Act "preempts 'any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by ERISA." *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 90, 77 L.Ed. 2d 490, 497 (1983). The pre-emption provisions are designed to 'establish pension plan regulation as exclusively a federal concern.' *Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 523 (1981)" *Pilot Life Ins. Co. V. Dedeaux,* 481 U.S. 41, 46, (1987). "The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." *FMC Corp. v. Holliday,* 498 U.S. 52, 58, 112 L. Ed. 2d 356, 364 (1990). And, as this Court has emphasized: "[W]e have applied the preemption clause to ensure that **benefit plans will be governed by only a single set of regulations.**" *FMC Corp.,* supra, 498 U.S. at p. 60, 112 L.Ed.2d at p. 365 (emphasis added).

> " The key to §514 (a) is found in the words 'relate to.' **Congress used those words in their broad sense, rejecting more limited pre-emption language** that would have made the clause 'applicable only to state laws relating to the specific

[5] E.g. state laws regulating insurance, banking, securities and criminal matters.

subjects covered by ERISA'. Shaw, supra * * *".
Ingersoll-Rand v. McClendon, 498 U.S. 133, 138,
112 L.Ed.2d 474, 483 (1990) (emphasis added)

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. * * * Under this 'broad commonsense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand*, supra, 498 U.S. at p. 139, 112 L.Ed. at p. 484. Thus, if the effect of a state law only indirectly affects an ERISA plan, the state law is considered to "relate to" such ERISA plan. *Pilot Life*, supra.

More recently, in *N.Y. Conference of Blue Cross v. Travelers Ins.*, ___ U.S. ___, 131 L.Ed.2d 695, 115 S. Ct. 1671, (1995), although this Court found that state surcharges imposed on employee health-care plans did not "relate to" employee benefit plans within ERISA's pre-emption provision, Your Honors again recognized that "a state law might produce such acute, albeit indirect economic effects, by intent or otherwise, * * * that such a state law might indeed be pre-empted under §514". (115 S.Ct. at p. 1683). That is exactly the result of the application of Louisiana's community property laws as regards benefits payable under ERISA covered plans, for Louisiana's community property laws do, in fact, produce **acute and direct economic effects** upon the federally governed pension plan which is the subject of this proceeding. The substantial reduction of the participant's income resulting from application of state community property law is the acute and direct economic effect on the

participant and on the plan administrator which occurs when state law dealing with the usufruct obligation to the sons is recognized by the Fifth Circuit decision. The sons are seeking, in their state court proceeding, an accounting and an award against the surviving spouse, Sandra, entitling them to collect from her a portion of each of the annuity payments paid in the past and a portion of the each of the annuity payments to be paid in the future.

III.

LOUISIANA COMMUNITY PROPERTY LAW "RELATES TO" THE BOGGS' ERISA PLAN

Louisiana community property law derives from Spanish and French sources and was introduced into Louisiana during the colonial period of the 18th Century. The purpose of community property law is to treat the spouses as partners during the marriage; English common law did not recognize the partnership concept of marriage and each party was the sole owner of his/her property whether acquired before or during the marriage. Under Louisiana law, earnings of each spouse are generally considered community property. La Civil Code art. 2338

However, the law is not all inclusive; Louisiana carves out areas of property law that remain unaffected by community property principles. Exceptions to the general community property rule involve spouses who enter into either prenuptial or post-nuptial agreements terminating the community property regime (La. C. C. arts. 2328 and 2329), donations to one of the spouses, income from a spouse's separate property when the recipient files an affidavit reserving the right

to retain that income as separate income, (La. C. C. art. 2339), personal injury damages, proceeds from life insurance policies, and property acquired with a combination of separate and community funds if the amount of community funds is "inconsequential in comparison to the value of the separate" funds (La. C. C. art. 2341). Thus, Louisiana's community property law does not include all property acquired during the marriage. More important, Louisiana community property law does not preempt or trump other Louisiana laws affecting property acquired during the marriage and surely not federal law.[6]

The community property regime terminates on death of a spouse, or judgment of divorce or separation of property, or matrimonial agreement that terminates the community. La. C. C. art. 2356. Property acquired after the termination of the community does not fall into the previously terminated community.

In the instant case, the Fifth Circuit correctly announced the basic community property theory that "each spouse owns 'a present undivided one-half interest' in all community assets, which vests from the moment of acquisition". The Fifth Circuit then fell into error, however, in concluding that the Boggs pension benefits were assets of Isaac's and Dorothy's marital community, and thus, permitted the sons to claim against the beneficiary, Sandra, a sum equal to the value Dorothy's alleged community interest, without acknowledging ERISA's preemption of the state law. The Fifth Circuit decision totally ignores the purpose of ERISA

[6] See e.g. *Walet v. Jefferson Lake Sulphur Co.*, 202 F.2d 433, 434 (5th Cir. 1953) holding that Louisiana community property law is pre-empted by the Securities Act of 1934. "In such circumstances, federal policy must prevail over the vagaries in local laws."

which is to protect and provide for the living participant and surviving beneficiaries, not the deceased spouse's legatees. 29 U.S.C. §1001.

> Pensions are designed for the benefit of the living.*** Congress' fundamental purpose was evident throughout to insure that both spouses would receive sufficient funds to afford them security during their lifetimes, not to arrange for an opportunity for a predeceased non-employee spouse to leave a part of her surviving husband's pension rights to others." *Ablamis v. Roper, supra,* at p. 1457.

The Fifth Circuit erroneously reasoned that Louisiana's community property system does not "relate to" an ERISA pension plan within the meaning of ERISA's preemption clause on the theory that: "A State community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators." *Boggs v. Boggs,* supra, 82 F.3d at p. 96. The implication of the foregoing sentence is that ERISA is limited only to protecting plan administrators and that to relate to ERISA within the preemption clause the state law must affect only the duties of plan administrators. Nothing could be further from the truth - ERISA protects plan beneficiaries first and foremost; it regulates plan administrators in order to ensure that beneficiaries receive the protected benefits.[7] (29 U.S.C. §1001)

[7] E.g. *Shaw, FMC, Pilot Life, Ingersol* and other authorities cited supra.

The Fifth Circuit attempts to justify its conclusion by saying:

> "Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary." (82 F.3d at p. 97)

The crucial date on which Dorothy's rights are determined is the date of her death in 1979. At that date neither she nor her estate, had any rights in the pension plan, because the federal law had previously preempted Louisiana community property law, the preemption having been effective on the effective date of the Act, January 1, 1975. 29 U.S.C. §1144 (a). Hence, in 1979, Dorothy had no transmissible rights to bequeath to her legatees.

Moreover, the above quoted statement by the Fifth Circuit is contradictory on its face. If "disposition of the proceeds only after payment to the designted beneficiary" was the only thing involved, this case would not have happened, because such disposition occurred many years **after** the community property regime between Isaac and Dorothy had terminated by her death. Prior to Dorothy's death the 'proceeds' were still in the plan and not within the control of the participant or non-participant spouse. In fact, when the initial "disposition of proceeds" to the designated beneficiary, Isaac, was made in 1985 Isaac was married to his second wife, petitioner, and the only *community* which existed at that time was the community between Isaac and his said second wife. Consequently, there is absolutely no foundation or justification for the Fifth Circuit to say that the first community (between Isaac and Dorothy) is entitled to an interest in the pension plan benefits, because that result "relates not to the plan but

to the disposition of the proceeds only after payment to the designated beneficiary". To the contrary, the Fifth Circuit's opinion itself shows that it is the plan, rather than merely the proceeds, which is affected by Louisiana community property laws when the court recognized Dorothy's alleged ownership interest in the plan benefits prior to distribution of the proceeds. Separating the plan from the proceeds is a distinction without a difference, which cannot be done to circumvent ERISA, for the federal statute preempts Louisiana community property law.

The erroneous result reached by the Fifth Circuit is proof that Louisiana's community property laws do "relate to" the pension plan, because those laws substantially affect the disposition of the economic benefits paid by the plan. To apply those laws so as to recognize an ownership interest in the participant's plan and benefits before he received them, and redistribute the pension benefits to a party not protected by ERISA, is contrary to the federal scheme. As Circuit Judge Wiener so correctly observed in his dissent:

> "The essence of the Sons' state action is a determination of the ownership of and entitlement to retirement benefits under an ERISA pension plan, the Bell Plan. Thus, the Sons' claims are necessarily premised on the very existence vel non of the Bell Plan. The result sought by the Sons would effectively alter the Participant's beneficiary designation under the plan." *Boggs v. Boggs*, dissenting opinion, 89 F.3d 1169, 1175 (5th Cir. 1996)

Thus, such state laws are preempted in order to assure payment of the benefits to the designated beneficiaries, the participant and the participant's spouse.

IV.

ERISA'S ANTI-ALIENATION, OR SPENDTHRIFT, PROVISION BARS RESPONDENT' CLAIMS

The anti-alienation, or spendthrift, provision of ERISA directs :

> "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056 (d) (1)

Consequently, the participant, Isaac, was prohibited from assigning or alienating his benefits during his lifetime.[8]

Likewise, Dorothy, Isaac's deceased wife, was prohibited from alienating, by her testament, pension plan benefits to third parties, her children. She, as a non-participant deceased spouse, **could not enjoy greater rights** than the participant, Isaac! Moreover, the anti-alienation clause prevents alienation by participants, participant's spouses, and beneficiaries, because it speaks in terms of alienation of the **benefits**, not in terms of action by any person or entity. The Fifth Circuit restricted application of the anti-alienation clause to protecting the participant from himself, which is contrary to the plain language of the clause.

The **only** exception to the broad coverage of the spendthrift clause is the Qualified Domestic Relations Order

[8] Isaac could designate a beneficiary other than his spouse only with the express consent of that spouse. 29 U.S.C. 1055 (c) (2) (A); likewise spousal consent is required to name non-spouse as beneficiary of an IRA 26 U.S.C. 408 (a) (6) requiring compliance with 26 U.S.C. 401 (a).

("QDRO") which will recognize an ex-spouse as an alternate payee under the plan, but only in limited situations and only for limited purposes. Since the attempted testamentary transfer by Dorothy to her sons does not qualify as a QDRO the transfer is prohibited by the Act.

The QDRO was incorporated in ERISA by the Retirment Equity Act ("REA") of 1984, Pub. 1. No. 98-397, 98 Stat. 1426. ERISA was thus amended to provide for partition of retirement benefits in state court marriage dissolution proceedings in order to protect the divorced spouse, child, or other dependant of a participant. The amending Act is very specific and limited. It provides that the above quoted non-alienation provision:

> "[S]hall not apply if the order is determined to be a qualified domestic relations order." (29 U.S.C. 1056 (d) (3) (A))

The Act then defines the QDRO as a domestic relations order which "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant", and "is made pursuant to a State domestic relations law (including a community property law)." 29 U.S.C. §1056 (d) (3) (B) (ii) (I) (II).

The REA amendment to ERISA is very restrictive and is mandatory in its application. Only Qualified Domestic Relations Orders of courts of competent jurisdiction, meeting certain specific requirements as spelled out in the Act, will be recognized and enforced by plan administrators. Moreover, QDROs are limited to a "spouse, former spouse, child, or other dependent of a participant", **none of which include the respondents** herein.

Therefore, the Respondents in this case, the major children of Isaac Boggs, could never present any order of a state court which would allow them to circumvent the non-alienation provision of ERISA. All they could ever present would be a probate order based upon their claim under Louisiana's community property laws. Any such probate order will not be recognized under ERISA, for it cannot qualify as a QDRO.

> "* * * ERISA's express statutory language and legislative history make it clear that Congress did not intend to classify state court orders effecting testamentary transfers as QDROs." *Ablamis v. Roper,* 937 F.2d 1450, 1455 (9th Cir. 1991)

Thus, the deceased non-employee spouse can not leave by her testament, her alleged community interest in pension benefits to third parties because:

> "That action clearly contravenes the language and purpose of ERISA and the QDRO exception. To the extent that state community property laws permit such transfers, they are preempted by section 1056(d). *Ablamis,* supra., 937 F.2d at p. 1457

The result of the Fifth Circuit's decision is to allow Louisiana's probate court to enter a monetary judgment *in personam* against Petitioner, Sandra, in a dollar amount equal to respondents' deceased mother's purported (community) share of the pension plan benefits. Thus, such an award would accomplish by indirection what ERISA prevents by direct

action. Since the anti-alienation or spendthrift clause prevents direct attachment of the pension funds in the hands of the administrator, to allow the Louisiana court to enter judgment against the beneficiary would circumvent the spendthrift provision by allowing the successful heirs of the non-participant spouse to execute against the plan benefits or any other funds or property which is owned by the participant or the beneficiary. Thus, the Louisiana court would achieve the same result as if it had decreed a property ownership in the pension plan in favor of the heirs or legatees of the non-participant spouse, which is contrary to the specific provisions of ERISA.

Moreover, such a result would be contrary to the teachings of this Court in related matters involving conflict between federal law and community property laws. Among those decisions are: *Wissner v. Wissner,* 338 U.S. 655 (1950) (military life insurance program); *Free v. Bland,* 369 U. S. 663 (1962) (U.S. Savings Bonds survivorship provision); and *Hisquierdo v Hisquierdo,* 439 U.S. 572 (1979) (railroad retirement benefits). By those decisions this Court has laid down the rule that where Congress has provided a comprehensive system for a particular purpose, whether railroad workers retirement, military personnel retirement, or savings bonds sales, community property laws awarding a non-participant spouse rights in the federally controlled program will not be recognized, except where specifically allowed by federal statute. In each of the above cited cases this Court has found that such an offsetting award or recognition of a community property interest in the employee's benefits would do "major damage" to a federal purpose.

> "An offsetting award, however, would upset the statutory balance and impair petitioner's

> economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater. ***" *Hisquierdo v. Hisquierdo,* 439 U. S. at p. 588

According to *Hisquierdo, Free* and *Wissner,* granting an "offsetting award", for the monetary equivalent of a portion of the employee's pension benefits, deprives the plan participant or his beneficiary of the plan benefits and thwarts the federally created protection envisioned by Congress.

In *Free v. Bland,* supra, this Court would not accept the fiction that a state law based judgment of ownership is permissible to dispossess the named beneficiary of federally created rights in U.S. Savings Bonds. Federal law designated the beneficiary under the bonds and established the order in which the benefits passed from person to person. The Texas Supreme Court in *Free* had applied Texas community property laws to circumvent the federal scheme by giving judgment to the heirs of the predeceased spouse of the bond owner against the named beneficiary. This Court struck down that decision and succinctly stated the test:

> "If the state can frustrate the parties' attempt to use the bonds' survivorship provision through the simple expedient of requiring the survivor to reimburse the estate of the deceased co-owner as a matter of law, the state has interfered directly with legitimate exercise of the power of the Federal Government to borrow money." (369 U. S. at p. 669)

In the instant case the Fifth Circuit has created a fiction that ignores the federally created rights of the participant and the participant's surviving spouse in favor of the heirs of the non-participant spouse. This result is achieved through the 'simple expedient' of the state community property laws in order to circumvent the provisions of ERISA. That result should not be permitted by this Court.

V.

LOUISIANA COMMUNITY PROPERTY LAWS DO 'MAOR DAMAGE' TO FEDERAL PURPOSES OF ERISA

As this Court has ruled:

> "State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden." *Hisquierdo v. Hisquierdo,* 439 U. S. 572, 581 (1979).

Louisiana's community property law, as applied to ERISA protected pension plans, does major damage to a federal interest. To allow the Louisiana state law to override ERISA covered pension plans, by confering ownership rights in the pension plan to the non-employee spouse, would result in the non-participant spouse becoming a co-equal participant with attendant rights of ownership including testamentary disposition, and the right to exercise options granted the participant by the ERISA plan. But ERISA demands that qualified benefits **shall** be paid to the participant, or the participant's surviving spouse, (29 U.S.C. §1055 (a)) except in cases where spousal consent has been obtained

in the naming of a beneficiary or where a qualified domestic relations order provides for an alternate beneficiary. Outside of those exceptions, the Act makes no provision for any rights in a non-participant.

As the Ninth Circuit recognized in *Ablamis,* supra:

> "Permitting a non-employee spouse to bequeath one-half of a surviving employee's pension benefits to a third party would do 'major damage' * * * ." (937 F.2d at pp.1459-1460)

Moreover, classification of pension benefits as marital property subjects ERISA plans to state law regulation under fifty different marital property laws. The stated purpose of uniform administration of pension plans will be destroyed by the diverse treatment of each state. Part of the federal interest evidenced by ERISA is its creation of a level playing field for all employees who move from state to state in the course of their working careers.

Judge Wiener, in his dissenting opinion, stated the problem thusly:

> "The other of ERISA's twin purposes - national uniformity - would be frustrated if heirs and legatees were allowed to prevail under state laws that would produce results different from those produced by ERISA's rules governing entitlement to and distribution of benefits. * * * Unavoidably, the amount of retirement income available for each participant in a given plan would vary depending solely on the serendipity of a participant's state of residence from time to time. A domiciliary

> history of moving in and out of community property jurisdictions would create an imposible accounting and allocation problem. Quite simply, ERISA's goal of uniformity would be unattainable if the ultimate enjoyment of ERISA plan benefits were left to the vicissitudes of the varying and disparate marital property laws of the several states, be they community or separate." *Boggs v. Boggs,* dissenting opinion, supra, 89 F.3d at p. 1177.

Just as important, as fair and equal treatment by employers, is the consistent and predictable treatment of state property laws. For example, the employee who begins a working career in a common law state, then moves to a commuity property state in the Fifth Federal Circuit (but not within the Ninth Federal Circuit) for a number of years, will not know how much of his/her pension benefits fall into the community, nor the value of his spouse's community interest in his pension. The plan administrator would be required by the Fifth Circuit decision to maintain running records of each participant's pension to determine at any point in time the value of the participant's interest in the pension plan. Such a situtation would create an accounting nightmare and seriously burden the administration of all pension plans. Again Judge Wiener observed:

> "As proof positive of a sufficient nexus between the Plan and the state law at issue, one need only observe, for example, that any calculation of the benefits claimed by the Sons would unquestionably require an analysis of the terms and conditions of the Bell Plan, as well as its records and those of its participants. Moreover, plan administrators would be forced to take burdensome precautions to protect the rights and interest in plan beneifts not only of the beneficiary but of the heirs and

legatees as well." (Foot note citing *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290 (5th Cir. 1989) (Citations omitted.) *Boggs v. Boggs*, dissenting opinion, supra, 89 F.3d at p. 1176.

Additionally, recognition of the spouse as an equal participant allows the spouse to name beneficiaries in the same manner as the employee-participant. There is no mechanism in ERISA for dual control of the plan benefits; ERISA speaks of the 'participant' in the singular! To elevate the non-participant spouse to the status of a co-participant would double the plan administrator's troubles by doubling the number of persons with whom he must deal.

VI

THE IRA ACCOUNT

Upon his retirement in 1985 (six years after Dorothy's death) Isaac rolled over the lump sum distribution of his ERISA pension plan proceeds into a qualified Individual Retirement Account under Internal Revenue Code §§401 et seq. Those lump sum benefits did not change in form or character by virtue of their being deposited to an IRA, nor would they have changed from pension plan benefits had they been deposited elsewhere. Thus, the funds derived from the ERISA plan are not subject to state community laws of ownership for the same reason the participant's annuity and the surviving spouse's annuity are not subject to state community property laws. Particularly, that act of transfer to the IRA in 1985 did not retroactively place the funds in Dorothy's estate as of her death in 1979 just because the funds had changed their situs from holdings by the plan administrator to being deposited in the IRA. Therefore, the funds which

were transferred to the IRA continued to fall into the same classification as the other pension plan benefits; their "spots" were not changed. Thus no distinction should be made between the funds in the IRA or other funds of the pension plan.

The Fifth Circuit, however, granted Dorothy's estate a community interest in the IRA funds stating that 26 U.S.C. section 408:

> "* * * governs the trust relationship between the government and the participant whose benefits are placed in an IRA account. It does not effect that participant's later obligation to his spouse to account for her portion of the benefits. This provision governing the disbursement of IRA funds cannot reasonably be interpreted to intervene in the martial relationship and divest one spouse of ownership rights." *Boggs v. Boggs*, 82 F.3d at p. 98.

The Fifth Circuit overlooked the fact that Dorothy never had the ownership rights to the pension benefits, wherever situated. The funds were in the ERISA pension plan at Dorothy's death, not in the IRA, and the funds could not become part of Dorothy's estate for the reasons heretofore stated, and surely not because of that change in depository six years after her death.

The Individual Retirement Account Act, 26 U.S.C. 408, specifically states that the IRA account is "for the exclusive benefit of the individual or his beneficiaries" (26 U.S.C. 408(a)) and "shall be applied without regard to any community property laws" (Id., sec. (g)) The section defines the

Account as a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries restricted by subsequent provisions of the law. The spouse of the individual is the automatic beneficiary under the joint and survivor annuity provisions, unless both spouses elect to waive the annuity and community property claims are specifically rejected.

Nonetheless, as above stated, the roll-over into the IRA did not change the character of the funds as being ERISA protected pension plan funds, particularly when the roll-over did not even take place until long after the first community was terminated by Dorothy's death.

CONCLUSION

As the American population achieves increased longevity, more and more participants in qualified pension plans will find themselves widowed and remarried. The financial needs of these people during their retirement years will be substantial as they age and do not continue to work. If state property laws are allowed to divide the participant's pension benefits upon the death of a spouse and allow the heirs of the deceased spouse to claim a portion of that pension, the participant will necessarily suffer a substantial reduction in his or her future standard of living, and ultimately will place

an increased burden upon society. In most instances, the children of the participant's spouse will be mature adults at the time the participant retires and will not qualify as dependents under the Act. Those adult children should not be allowed to deprive the participant and the participant's spouse of the retirement benefits needed to support them. The stated purpose of ERISA is to provide the participant with an income stream during retirement years; the Act speaks only of retirement income and retirement pensions. Certainly, it cannot be said that the claimants to a portion of the participant's pension, based on state community property law, are "retirees" or "participants" under any retirement plan; they are "creditors" based on a state law that would re-order the rights of the parties to a retirement plan.

The community property laws, and the marital property laws of the non-community property states, are the type of laws that Congress intended to preempt by ERISA in order to provide a uniform and certain pension benefit law throughout the fifty states.

> "The basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans". *N. Y. Conference of Blue Cross v. Travelers Ins.*, ____ U.S. ____, 115 S. Ct. 1671, 1677, 131 L.Ed. 2d 695 (1995)

Unless the decision of the Fifth Circuit is reversed, that goal of uniformity will not be achieved.

For all of the above and foregoing reasons, it is respectfully submitted that the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

Dated: December 2, 1996, Mandeville, Louisiana.

Respectfully submitted.

Marian Mysing Livaudais,*
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APPENDIX A

SUBTITLE A—GENERAL PROVISIONS

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an imprtant factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax

treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc. for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

(Pub.L. 93—406, Title I, § 2, Sept. 2, 1974, 88 Stat. 832.)

29 USC 1055

§ 1055. Requirement of joint and survivor annuity and preretirement survivor annuity

(a) Required contents for applicable plans

Each pension plan to which this section applies shall provide that—

(1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and

(2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

29 USC 1056

§ 1056. Form and payment of benefits

x x x

(a) - (c) omitted

(d) Assignment or alienation of plan benefits

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(d)(2) omitted

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph—

(i) the term "qualified domestic relations order" means a domestic relations order—

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

29 USC 1144

§ 1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

APPENDIX B

LOUISIANA CIVIL CODE

Art. 2328. Contractual regime; matrimonial agreement

A matrimonial agreement is a contract establishing a regime of separation of property or modifying or terminating the legal regime. Spouses are free to establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law. The provisions of the legal regime that have not been excluded or modified by agreement retain their force and effect.
Acts 1979, No. 709, § 1.

Art. 2329. Exclusion or modification of matrimonial regime

Spouses may enter into a matrimonial agreement before or during marriage as to all matters that are not prohibited by public policy.

Spouses may enter into a matrimonial agreement that modifies or terminates a matrimonial regime during marriage only upon joint petition and a finding by the court that this serves their best interests and that they understand the governing principles and rules. They may, however, subject themselves to the legal regime by a matrimonial agreement at any time without court approval.

During the first year after moving into and acquiring a domicile in this state, spouses may enter into a

matrimonial agreement without court approval.
Acts 1979, No. 709, § 1. Amended by Acts 1980, No. 565, § 1.

Art. 2341. Separate property

The separate property of a spouse is his exclusively. It comprises: property acquired by a spouse prior to the establishment of a community property regime; property acquired by a spouse with separate things or with separate and community things when the value of the community things is inconsequential in comparison with the value of the separate things used; property acquired by a spouse by inheritence or donation to him individually; damages awarded to a spouse in an action for breach of contract against the other spouse or for the loss sustained as a result of fraud or bad faith in the management of community property by the other spouse; damages or other indemnity awarded to a spouse in connection with the management of his separate property; and things acquired by a spouse as a result of a voluntary partition of the community during the existence of a community property regime.
Acts 1979, No. 709, § 1. Amended by Acts 1981, No. 921, § 1.

Art. 2356. Causes of termination

The legal regime of community property is terminated by the death or judgment of declaration of death of a spouse, declaration of the nullity of the marriage, judgment of divorce or separation of property, or matrimonial agreement that terminates the community.
Acts 1979, No. 709, § 1. Amended by Acts 1990, No. 989, § 2, eff. Jan. 1, 1991.

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QUESTIONS PRESENTED

I.

Does federal ERISA law preempt the State of Louisiana's community property/inheritance law?

II.

Does the ERISA anti-alienation provision apply to funds after they have been paid by the plan administrator to a beneficiary?

III.

Does ERISA preempt state laws that provide for a claim against funds that have been paid by the plan administrator to a beneficiary?

IV.

Does a Louisiana Judgment of Possession rendered in 1980 meet the criteria of a QDRO?

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STATEMENT OF THE CASE

The basic facts of this case[1] are not in dispute. Isaac Boggs, Jr. ("Isaac") married Dorothy Boggs ("Dorothy") in 1949, the same year that he began employment at South Central Bell. Dorothy predeceased him in 1979; they had been married 30 years. Isaac and Dorothy had three children: David Bruce Boggs, Thomas Frank Boggs, and Harry Maurice Boggs, respondents herein.

In 1980, Isaac married the petitioner herein, Sandra Jean Boggs. In 1985, when Isaac retired, he was eligible for benefits from the BellSouth Management Savings Plan ("the plan"). That plan is subject to ERISA and the Retirement Equity Act of 1984, 29 U.S.C. §1001 *et seq*. He received a lump sum distribution of plan benefits of $151,628.94, which he then "rolled over" into an IRA account, and Isaac named Sandra, his second wife, as beneficiary under the plan and the IRA. The IRA is a qualified account under IRC Section 401 *et seq*.

Isaac made no withdrawals from the IRA account prior to his death in February, 1989, at which time the IRA account was valued at $180,778.05. In addition to the lump sum distribution from the plan, Isaac acquired 96 shares of AT&T stock which were distributed to him when he retired, and life insurance policies payable to Sandra as the named beneficiary.

The sole testamentary disposition of Dorothy's will, dated January 11, 1967, states: "I give and bequeath the maximum permitted under the law to my beloved husband, Isaac

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[1] The Joint Stipulation of Fact is reproduced in Joint Appendix pp. 25-30.

Boggs, together with the lifetime usufruct over the balance."[2]

The "Judgment of Possession"[3] in the succession of Dorothy Boggs, dated February 5, 1980, summarized below, ordered:

> **[1]** Isaac "be recognized as the surviving spouse in community with the decedent [Dorothy] and as such the owner of an undivided one-half (½) of all the property belonging to the decedent;"[4] **[2]** Isaac "be recognized as a particular legatee and, as such, placed in possession of an undivided one-third (1/3) of all the property belonging to the decedent as well as the lifetime usufruct of the other undivided two-thirds (2/3) of decedent's property;"**[3]** respondents herein "be recognized as the children and sole heirs of the decedent and, as such, placed in possession of two-thirds (2/3) of all the property belonging to the decedent in the proportions of an undivided one-third (1/3) each, **[4]** subject to the lifetime usufruct in favor of their father, Isaac E. Boggs, Jr., including, but not limited to..." a detailed list of specific property which followed, including the Bell Systems Savings Plan for Salaried Employees in the name of Isaac Boggs, Jr. (then valued at $42,388.57) and AT&T stock.

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[2] Record at 52.

[3] Record at 53-57.

[4] This judgment should have read "...(½) of all the property of the community of decedent and her husband." As stated in the judgment, this contradicts both the will and Louisiana law, and is impossible, because under the terms of the judgment, Isaac would have inherited 1/6 more of the property than actually existed.

Isaac's will dated May 31, 1985, gave a life usufruct to his then-wife, Sandra, "of that portion of my estate, both separate and community, which I leave to my children....I further give to my wife, as usufructuary, the right to sell all or any part of the property subject to her usufruct without the consent of the naked owners. I give, leave and bequeath to my children [respondents herein], or their descendants per stirpes should any of them predecease me, all of my estate in equal portions, share and share alike"[5]

At his retirement in 1985, Isaac began receiving a monthly annuity of $1,777.67, based on more than 36 years of employment. That annuity was converted into a survivor's annuity upon his death in 1989, and which is currently paid to Sandra.

After Isaac's death, two of the Boggs children filed an action in Louisiana state court seeking an accounting of their father's usufruct and an award of some portion of the retirement benefits. Sandra Boggs sought a declaratory judgment in federal district court (naming all three of Isaac's children as defendants) that ERISA preempts Louisiana community property law, thereby preventing the children from receiving any portion of the pension benefits.

The district court held that "ERISA merely imposes standards on private administrators of private benefit plans [and] does not evince any special concern for preserving all of the benefits of the plans for the participants." Further, the court found, application of Louisiana's community property law would not do "major damage to any federal interest."

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[5] Record at 50.

The Fifth Circuit U.S. Court of Appeals, in an opinion drafted by Judge John Minor Wisdom, agreed with and affirmed the district court's decision, after analyzing both the purpose of ERISA and Louisiana community property law and tradition. The Court held that under the facts of this case, Louisiana community property law is not sufficiently "related to" an employee benefit plan to necessitate ERISA preemption, because nothing was sought from the plan or its fiduciary, and no duty would be imposed on the administrator.

Judge Wisdom noted that the area of state domestic relations law has long been "sacrosanct" and protected against federal intrusion. The Court noted that this decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary. The Court also determined that neither ERISA's spendthrift provision[6] nor the IRA provision enacted as part of ERISA[7] had displaced or preempted Louisiana's community property law.

The Fifth Circuit decision reiterated its prior position[8] that "ERISA was not meant to consume everything in its path."

SUMMARY OF THE ARGUMENT

The decision of the Fifth Circuit should be affirmed.

The ancient community property laws of Louisiana are not displaced or superceded by the federal enactment of the

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[6]29 U.S.C. §1056(d)(1).

[7]26 U.S.C. §408.

[8]As stated in *Hook v. Morrison Milling Co.*, 38 F.3d 776, 786 (5th Cir. 1994).

preemption provision of ERISA.[9] Historical federal jurisprudence and the enactments of Congress in ERISA together mandate that our federal system of law has consistently honored domestic relations and marital property rights as the province of the states.

To reverse the ruling of the lower courts in this case would disturb an important foundation of our federal system, that is, the traditional areas of state concern, and the clear intent of Congress.

The judiciary in its decisions, the Congress in legislation and the executive branch of government exercising rule-making powers have all agreed that the anti-alienation provision contained in ERISA[10] does not apply to funds once they have been received by the participant or beneficiary, nor is transfer by operation of law such a prohibited alienation under federal law, due to insufficient federal interest. ERISA mandates recognition of prior spouses' and childrens' rights to pension funds through a state decree. A judgment of possession in a succession meets criteria for a qualified domestic relations order.

The provisions of federal tax laws are not determinative of the ownership of marital property. State law decides the effect of the spendthrift provisions with regard to an IRA. Under the facts of this case, there is no reason to find that ERISA preempts state domestic or inheritance law.

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[9]29 U.S.C. §1144(a).

[10]29 U.S.C. §1056(d)(1).

THE ARGUMENT

I.
The Purpose of the Employee Retirement Income Security Act

In 1974 the Congress adopted ERISA. The purposes of the Act are set out at 29 U.S.C. §1001. Generally, they set out that retirement plans and their management have grown into a national concern that affects interstate commerce; that there existed a lack of information given to the employee as to the terms of their retirement plans. In addition to addressing these concerns, the purpose of ERISA is to provide safeguards as to the administration of the plans, provide minimum standards of financial soundness of the plan to pay promised benefits, and ensure reasonable vesting provisions.

The purpose also includes establishing standards for the conduct, responsibility and obligations of fiduciaries of employee benefit plans and appropriate remedies, sanctions and ready access to the federal courts. The Act sets out the purpose of requiring plan termination insurance; and protects employees by improving the equitable character of benefit plans by requiring them to vest the accrued benefits of employees with significant periods of service.[11]

Curiously absent from the stated purpose of ERISA is the establishment of nationally uniform property rights as between spouses.

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[11] 29 U.S.C. §1001.

II.
The Purpose and Application of Louisiana's Community Property and Inheritance Laws

In Louisiana, "marriage is a legal relationship between a man and a woman that is created by civil contract."[12]

The Fifth Circuit correctly determined in this case, and the Petitioners concede, that under Louisiana's community property regime, "each spouse owns a 'present undivided one-half interest' in all community property assets, which vests from the moment of acquisition."[13] Neither the community nor things of the community may be judicially partitioned prior to the termination of the community regime; during the existence of the community property regime, the spouses may voluntarily partition the community property, but this division agreement must be evidenced by authentic act.[14]

A matrimonial regime is a system of principles and rules governing the ownership and management of the property of married persons as between themselves and toward third persons.[15] The district court also correctly concluded that under Louisiana's community property regime, a non-employee spouse has a right to claim pension and survivorship benefits even if such do not become payable until after the community is dissolved, so long as both the pension and the community co-

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[12] La. Civ. Code Art. 86.

[13] See Brief for Petitioner on the merits (hereinafter "P. Brief") at p. 12.

[14] La. Civ. Code Arts. 2331, 2336.

[15] La. Civ. Code Art. 2325.

exist for some period of time.[16]

It may be helpful here to trace Isaac's pension plan and benefits and its disposition under Louisiana law:

[1] Isaac began working for South Central Bell the same year he and Dorothy married, 1949. On the date of their marriage, the community property regime commenced. There is no record of a declaration of partition of community property. **Dorothy's rights to community property vested at its inception, instantaneously with Isaac's.**

[2] Isaac began paying into a pension plan , which could not have been governed by or even anticipated ERISA until at least 1974, when ERISA was enacted. Neither Dorothy nor Isaac, could have received a distribution of plan benefits prior to his retirement or death. The pension plan was voluntary and privately funded. His earnings (wages) are community property under Louisiana law. Any community funds that were paid into the pension plan could have been placed elsewhere, for example, in a savings account. Any sums paid into the plan by the company would be considered fruits of the labor of the community, and thus community property. As the district court properly stated, under Louisiana law, **Dorothy (and Isaac) had an undivided interest in the retirement plans at the time that the fund was established**, an "incorporeal, movable right," which was classified as such at the dissolution of the community (on the date of her death).

[3] Dorothy and Isaac were married for 30 years, until her death in 1979. Three children were born of this marriage;

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[16] The district court and Fifth Circuit opinons are reproduced in the appendix to Petioner '◦ Petition for Writ of Certiori before this Court.

these children were also Isaac's only children. Under Louisiana inheritance law, the children are considered "forced heirs" unless disinherited for specific, very limited reasons.[17] Neither Dorothy nor Isaac disinherited the children. Forced heirs inherit by operation of law, and parents can bequeath more, but not less, than the forced heirs' legal portion. At the moment of her death, however, by operation of law, **Isaac had legal "usufruct"[18] over Dorothy's one-half interest in community property, but only until his death or remarriage.**[19]

[4] The sole testamentary disposition of Dorothy's will stated only:

> "I give and bequeath the maximum permitted under the law to my beloved husband [Isaac] together with the lifetime usufruct over the balance."

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[17] See *Succession of Lawrence*, App. 1 Cir. 1993, 623 So.2d 96.

[18] La. Civ. Code Art. 535 defines usufruct as "a real right of limited duration on the property of another. The features of this right vary with the nature of the things subject to it as consumables or nonconsumbles." The duty of the usufructuary [holder of the usufruct] of a consumable is to pay the naked owner either the value the things had at the commencement of the usufruct or deliver to the naked owner things of the same quantity and quality. (Art. 538). Usufruct may be established by a juridical act [a conventional usufruct] either inter vivos or mortis causa, or by operation of law[a legal usufruct]. (Art. 544).

[19] Dorothy, by testamentary dispositon of her will, *infra*, granted Isaac a conventional usufruct for life, confirming and expanding the legal usufruct over community assets (which would have ceased upon his marriage to Sandra). This would not have conflicted with forced heirship law; his duty of accounting and delivery was the same regardless of the duration of the usufruct.

It appears that Dorothy had no separate property at the time of her death, only a ½ interest in community property. Under the principle of *le morte saisit le vif*, by operation of law, **all heirs and legatees inherited, and their rights vested, at the moment of her death.**[20] The "Judgment of Possession" recognizes and clarifies the share of the heirs and legatees by operation of law under both community property and forced heirship principles. Isaac was recognized as the naked owner of an undivided ½ interest of all the property belonging to the community, placed in possession of an undivided 1/3 of all the property belonging to Dorothy (her ½ of the community), and

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This is commonly known as "seizin," which means that, under La. Civ. Code Art 940: A succession is acquired by the legal heir, who is called by law to the inheritance immediately after the death of the deceased person to whom he succeeds....This rule applies also as to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees." *Planiol*, the noted 20th Century commentatior on Civil Law, in his *Traite Elementaire de Doit Civil* (1938) [English translation by the Louisiana Law Institute, 1959], says at No. 1938:

> (1) Taking possession of property.
> An heir entitled to seisin can take possession of the decedent's estate, both in reality and in personality, without complying with any formalities. He can immediately begin to administer the estate, and receive revenues and fruits.

This concept is expressed in La. Civ. Code Art 941, and is traced back by Planiol as far back as A Decision of 1259: "*Per conseuelue denym terrae mortuus debebat vivium saisire.*" (Olim, I, 452, §xvii). Interestingly, the only particular legacy recognized in the judgment of possession was the disposition of 1/3 of all Dorothy's property in naked ownership and the lifetime usufruct of the other 2/3 (of which the children had naked ownership, subject to Isaac's usufruct). As heirs of the blood, the children were seized upon their mother's death, and not particular legatees who had to be put into possession by judgment. Louisiana codified this concept into successions law before France.

given a lifetime usufruct of the other 2/3 of Dorothy's property. The children were recognized as the sole heirs of Dorothy and placed in possession of 2/3 of her property, divided further into thirds for each child, subject to the lifetime usufruct of Isaac.[21] The Judgment of Possession is a memorialization of the rights of all heirs and legatees, which had already vested at the moment of Dorothy's death.

[5] Isaac married Sandra in 1980; they had no children together. Like Dorothy, **Sandra's rights in the community property vested at its inception, at the moment of their marriage, as to the fruits of the labor of that community**. Under Louisiana community property law, she did not have an automatic right to any of his separate property or property acquired before the inception of the Isaac-Dorothy community.

[6] Isaac retired in 1985, receiving a lump sum, which he "rolled over" into an IRA[22], stock, and a life insurance policy payable to Sandra as the named beneficiary. He began receiving a monthly annuity, which continued until his death in 1989. It appears undisputed that *Isaac's* **"incorporeal, immovable" rights in the plan vested at the time of its inception, even though he could not withdraw those funds until retirement.**

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The application of marital property and inheritance law is complex and pervades many facets of life in Louisiana, but state and federal district courts have, for the most part, developed considerable expertise in such divisions as a matter of course over generations. [The error in the judgment is noted *supra*.] The application of these principles to property other than the ERISA plan benefits does not appear to be in dispute.

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It is assumed that this "roll over" was voluntary and that Isaac could have disposed of this lump sum in another fashion, such as a savings account or purchase of real property, etc., but that the roll over was performed to avoid tax consequences and/or penalties.

[7] When Isaac died in 1989, the heirs' and legatees' rights vested at the moment of his death, as did their rights to full ownership of Dorothy's property. His will gave Sandra the family home, property and fixtures, and a life usufruct to Sandra over all of his estate, both separate and community, that he left to his children. **Sandra had a vested right in naked ownership of her own portion of the community of Isaac-Sandra, which is ½, by operation of law. She has a usufruct over Isaac's ½ of the community property by operation of law until death or remarriage.** His will left all his separate and community property, minus the home, to his children in naked ownership in equal shares, subject to a life usufruct of Sandra. As with their mother's estate, the children were the forced heirs of Isaac by operation of law, but he left them more than was required by law. Sandra began receiving a lifetime survivor's benefit, as per terms of the benefits plan, after Isaac's death. Her right to receive a survivor's annuity under the terms of the plan is not in dispute.

* * *

Two sons sought a declaration of their rights under state law, including an accounting of Isaac's usufruct delineated in the Judgment of Possession from Dorothy's succession, and an award of some portion of the retirement benefits proportional to the share of the community of Isaac-Dorothy. Petitioner herein, Sandra, filed a Complaint for Declaratory Judgment seeking a ruling that ERISA preempts Louisiana community property law. In that complaint, she states that "neither the assets and/or benefits [the stock, lump sum and annuity] were included in the detailed descriptive list filed in the Succession of Isaac" because ERISA preempts community property/succession laws as to those assets, and therefore the children have no interest in the assets and/or benefits of the retirement plan.

Petitioner states that "the crucial date on which Dorothy's rights are determined is the date of her death in 1979. At that date neither she nor her estate, had any rights in the pension plan, because federal law had previously preempted Louisiana community property law, the preemption having been effective on the effective date [of ERISA]." No authority, state or federal, is cited for this proposition.[23]

If this Court were to adopt Petitioner's pronouncements as a rule of law, it would be akin to announcing that community property rights in assets, whatever their character, do not vest until death. Surely such an announcement would disregard the tradition of "[f]ederal respect for state domestic relations law" and this Court's jurisprudential interpretation of preemption that "[w]hen courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that state law should be given precedence."[24]

Dorothy is deceased. We do not know whether had she known (or even suspected) that all rights to any pension benefits for her or her heirs terminated at her death, she would have made other provisions for her children or preserved a portion of community assets for them in a form other than an ERISA plan. Non-participating spouses should be forewarned.

III.
ERISA and Preemption

The final form of the ERISA preemption clause states:

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[23] See P. Brief at 14-15.

[24] *Brandon v. Traveler's Insurance Company*, 18 F.3d 1321, 1326 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 732 (1995).

§1144. Other laws

(a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

This final form is the product of the American legislative process.

The actual historical evidence of Congressional intent regarding preemption is sparse.[25] It reveals that Congress gave little thought to preemption.[26] The versions of ERISA which were exposed to public and legislative scrutiny tied the scope of preemption to the scope of ERISA regulation.[27] The House bill would have preempted only state laws that relate to reporting, disclosure and fiduciary responsibilities, and state laws that relate to funding and benefits-vesting provisions of pension plans.[28] The Senate legislation preempted state laws that "relate to the subject matters regulated by this Act."[29] ERISA emerged from a Conference Committee with the present language only 10 days prior to the enactment; the change brought little

[25] *See* Fisk, The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism, 32 Harvard Journal on Legislation, 35, 52 (Winter, 1996).

[26] *Ibid.*

[27] *Ibid.*

[28] *Ibid.* at 52-53.

[29] *Ibid.* at 53.

discussion.[30]

The quiet birth of the ERISA preemption clause did not portend a quiet existence; over 3,000 cases have been filed related to the issue.[31] There is evidence that some members of Congress thought that the newly fashioned preemption provision would soon be revisited. Section 3022 of ERISA mandates a Joint Pension Task Force to study the effects and desirability of Congressional preemption. The Task Force study never materialized.[32]

The yoke fell on the shoulders of the courts to provide a workable meaning to the crucial clause. The term "relates to" has been a particular nuisance. In *N.Y. Conference of Blue Cross v. Travelers Ins.*[33], Justice Souter stated: "[W]e have to recognize that our prior attempt to construe the phrase `relate to' does not give us much help drawing the line here." Elsewhere in the opinion, Justice Souter found:

> "If `relate to' were taken to extend to the farthest stretch of its indeterminacy, then for all practical purposes preemption would never really run its course....But that, of course, would be to read Congress's words of limitation as mere sham, and to read the presumption against pre-emption out of the law whenever Congress

[30] *Ibid.*

[31] *Ibid* at 59.

[32] *Ibid* at 54-55.

[33] 115 S.Ct. 1671 (1995). In this case, Justice Souter outlines previous judicial experiences with the "relates to" clause.

speaks to the matter with generality.[34]

Further, his analysis continued,

> "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."[35]

With this innovative effort the Court in its recent bout with the troubling clause committed itself to completing the task left undone by Congress. The Court came to the conclusion that

> "The basic thrust of the pre-emption clause, then was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[36]

The Court further included stated laws that provide alternate enforcement mechanisms as candidates for preemption.[37] With this opinion the Court clearly established a predictable, meaningful interpretation of the preemption clause while showing the continuity of its jurisprudence, which consistently preempted those state laws which threaten the uniform administration of benefit plans.

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[34] *N.Y. Conference of Blue Cross, supra*, at 1677.

[35] *Ibid.* at 1677-1678.

[36] *Ibid.*

[37] *Ibid.*

The earlier case of *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), had already drawn the distinction between the regulation of plans and that of distribution of benefits. In declining to find preemption in that case, this Court reasoned that the state law at issue "...fails to implicate the regulatory concerns of ERISA itself...The focus of ERISA is on the administrative integrity of benefit plans---which presumes that some type of administrative activity is taking place." Further, this Court stated that "ERISA's pre-emption provison does not refer to state laws relating to `employee benefits' but to state laws relating to `employee benefit *plans*"[38]

The Tenth Circuit, citing *Fort Halifax, supra,* in *Guidry v. Sheet Metal Workers International Association, Local No. 9,* 39 F.3d 1078, 1085 (10th Cir. 1994), *cert. denied* 115 S.Ct. 169, reasoned that

> "As the Supreme Court has pointed out, ERISA's pre-emption provision does not refer to state laws relating to `employee benefits' but to state laws relating to `employee benefit plans.'"

The Fifth Circuit's affirmation of the lower court decision in the present case, *Boggs,* is right on point. In finding that the venerable property laws of the State of Louisiana do not threaten the administration of an employee benefit plan, Judge Wisdom reasoned:

> "This Court concludes that, under the facts of this case, the Louisiana community property law is not sufficiently `related to' an employee benefit plan to necessitate ERISA preemption...Benefits will continue to be paid to

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[38] 481 U.S. 1 (1987) at 7, 15. (Emphasis in original.)

> the beneficiary in the manner provided in the plan. A spouse's accounting obligation under community property law affects employee benefit plans `in too tenuous, remote, or peripheral a manner to warrant a finding that the law `relates to' the plan. Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary..."[39]

Petitioner contends that the payment (distribution) of benefits in and of itself "relates to" the pension plan.[40] Petitioner's reasoning is contrary to the holdings of this Court. It obliterates the distinctions between "benefits" and "benefit plans," outlined by Congress and honed by jurisprudence for the purpose of preemption determinations under ERISA.

The accounting for benefits after they are paid and no longer managed by the beneficiaries of the plan certainly do not "relate to" the administration of a pension benefit plan.

IV.
ERISA Preemption of State Community Property Laws: The Courts Say "NO"

Following the enactment of ERISA, the traditional jurisdiction of the states in domestic relations and community

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[39] *Boggs v. Boggs*, 82 F.3d at 96-97 [citations omitted].

[40] Petioner has missed the distinction between the terms "payable" and "paid,": "The erroneous result reached by the Fifth Circuit is proof that Louisiana's community property laws do `relate to' the pension plan, because those laws substantially affect the disposition of the economic benefits paid by the plan." See P. Brief at 15 and Respondent's footnote 72, *infra*.

property matters, and the underlying foundation that supported that jurisdiction, was undisturbed.

For example, *The Marriage of Johnston*, 149 Cal. Rptr. 798 (1978), *cert. denied* 444 U.S. 1035, is a California Supreme Court decision upheld by this Court. The California Court's decision stated that "the laws relating to marital dissolution are uniquely local in nature."[41] That Court cited a previous decision[42] that

> "whether the community property laws are such laws [to be preempted by ERISA] is not stated in the Act. If they are determined to be such, the federal judiciary will have been granted a roving commission to delineate family property law with little assistance from the Congress as to how to proceed. Hopefully Congress did not intend that the members of the federal judiciary begin ad hoc to create a body of federal law in an area so traditionally the preserve of the states."

The California Supreme Court in *Johnston* noted that the *Pardee* decision[43] had set out that

> "The legislative history suggests that the Congressional uniformity was confined to matters involving the minimum standards of pension plans and the safeguards necessary to secure equitable administration....An intent to regulate pension plans does not necessarily include an

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[41] *Marriage of Johnston* at 805.

[42] *In re Marriage of Pardee*, 408 F.Supp. 666 (C.D. Cal 1976) at 669.

[43] *Pardee* at footnote 4.

intent to control the state's distribution of family assets in divorce and separation proceedings."

The following year in *In re Marriage of Campa*, 152 Cal. Rptr. 362 (1979), *cert. denied* 444 U.S. 1028, the California Supreme Court extensively listed the evidence of Congressional intent in adopting ERISA. The California Court found that ERISA dealt with the administration of pension plans, and that "Congress, in essence, aimed at assuring that pension rights are real---that new employees are not kept from participating in a plan for a long time and that the expected benefits do not evaporate due to unfunded maladministration, a company going out of business or a termination after many years of work. The preemption claim and ERISA's section 1144(a) must be viewed in this setting."[44] The Court held that ERISA did not preempt California community property laws. The appeal of this case was dismissed by this Court for lack of a federal question.[45]

Federal Courts were in accord with the view that ERISA did not snatch historic control over domestic relations and property law away from the states. In *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), the Ninth Circuit held that ERISA did not preempt state court orders to pension plans to pay a community property share of plan benefits. Citing *Campa*, the Court held that ERISA did not foreclose suits in state courts that seek to enforce a community property interest.

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[44] *Campa* at 367.

[45] 444 U.S. 1028. *See also In re Marriage of Pilatti*, 157 Cal. Rptr. 594 (1979), *cert. denied* 445 U.S. 916, which reached the same conclusion that community property laws survive ERISA.

In *Ball v. Revised Retirement Plan for Salaried Employees of Johns-Manville Corp. And Subsidiaries*, 522 F.Supp. 718 (Colo. 1981), the Court assessed the status of current jurisprudence on the subject of preemption of state domestic laws and found that virtually every other federal court presented with this question has found that assignments pursuant to domestic relations decrees are implied exemptions from ERISA's preemption and anti-alienation provisions.[46]

Clearly the law on the subject of state property and domestic law, and its non-preemption by ERISA was settled. The federal and state courts had reached an understanding that the laws of the states would remain in effect and fully enforceable. Spouses could rely on the rights given to them under the community property laws of their states.

Petitioners herein place much reliance on *Wissner v. Wissner*, 338 U.S. 655 (1950), *Free v.. Bland*, 369 U.S. 663 (1962) and *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).[47]

These cases dealt with federal preemption of community property laws in the matters of life insurance programs, U.S. savings bonds survivorship provisions, and railroad retirement benefits, respectively. The distinction to be drawn from the case

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[46] Cases cited included *Operating Engineers Local No. 428 Pension Fund v. Zamborsky*, 470 F.Supp. 1174 (D. Ariz. 1979), *aff'd* 650 F.2d 196 (9th Cir. 1981); *American Telephone and Telegraph v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Cody v. Rieker*, 454 F. Supp. 22 (E.D. NY 1978), *aff'd* 594 F.2d 314 (2d Cir. 1979); *Central States Southeast and Southwest Areas Pension Fund v. Parr*, 480 F.Supp 924 (E.D. Mich. 1979); *Senco of Florida, Inc. v. Clark*, 473 F.Supp 902 (M.D. Fla. 1979); *Cartlege v. Miller*, 457 F.Supp 1146 (S.D. N.Y. 1979). *See also Bowen v. Bowen*, 715 F.2d 559 (11th Cir. 1983).

[47] *See* P. Brief at 19-21.

at bar is that these benefits were in major part federal programs funded with public monies; in each case a federal purpose was assigned by the courts for the expenditure of the monies or retirement benefits to justify preemption of state law.

This Court took note of this distinction in *Hisquierdo, supra,* at footnote 24 of that opinion, noting that

> "In this case, Congress has granted a separate spouse's benefit, and has terminated that benefit on absolute divorce. Different considerations might well apply where Congress has remained silent on the subject of benefits for spouses, particularly when the pension program is a private one which federal law merely regulates. See Employment Retirement Income Security Act of 1974, 88 Stat. 829, 29 U.S.C. Sec. 1001 *et. seq.* Our holding expresses no view concerning the application of community property principles to benefits payable under programs that possess these distinctive characteristics."

This Court's careful attention to community property rights in *Hisquierdo, Campa,* and other California cases affirmed by the Supreme Court, cited together with the solid jurisprudence of lower courts across our nation, evidences a strong statement by the federal judiciary of the vitality of community property laws in the face of a challenge under ERISA.

V.
The REA and QDRO Preemption of State Community Property Law: Congress Says "NO"

In 1984, Congress amended ERISA via the Retirement

Equity Act (REA)[48]. This amendment contained provisions dealing with allocation of assets of different pension plans, lowering age requirements for participation and vesting, increased involuntary cash out provisions, and tax law changes as to benefits. Included in the REA was the mandate that annuity plans be required for surviving spouses and the creation of the Qualified Domestic Relations Order (QDRO). The latter provisions are the subject of consideration in this case.

As stated in *N.Y. Conference of Blue Cross, supra,* "[P]reemption claims turn on Congressional intent." Petitioner and the U.S. Department of Labor contend that the enactment of these provisions changed the harmonious co-existence of ERISA and the property laws of the states.[49] The best evidence of Congressional intent simply does not bear this out.

Most of the major provisions of the REA were contained in a bill first introduced by Rep. Geraldine Ferraro as HR 1641 on February 6, 1981.[50] Representative Ferraro reintroduced her legislation in the 98th Session in 1984 as HR 2100. The Reagan administration had legislation introduced covering the same subject matter in the fall of 1983 by Rep. John Erlenborn as HR 4032. After the Subcommittee on Labor-Management Relations, chaired by Rep. Clay, ordered HR 2100 amended, Rep. Clay introduced HR 4280 to reflect the subcommittee

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[48] P.L. 93-406, 88 Stat. 829.

[49] *See* P. Brief at 16-18. The United States' argument appears to depend exclusively on the REA provision to create a preemption of state property laws under ERISA. *Amicus Curiae* Brief of the United States Supporting Petitioner (hereinafter S.Brief) at 12-21.

[50] See 130 Cong. Rec. (House) at 23486, remarks made by Rep. Bill Clay, the lead author of HR 4280 (the REA provisions).

amendments. That bill eventually passed Congress with the adoption of Senate amendments on August 9, 1984. Original co-authors included Rep. Erlenborn, Rep. Marge Roukema and Rep. Ferraro. All were recognized by their colleagues for their leadership and involvement in the passage and development of the REA.[51]

On August 9, 1984, these sponsors stated from the floor their intent on the effect of the REA on the property laws of the states, as follows:

Rep. Erlenborn:

> "Another provision of the bill [HR 4280, the REA], a modification of one originally included in my ERISA Simplification Act [HR 3071] preserves and clarifies the original broad exemption of state law under ERISA Section 514 while carving out an appropriate and well defined exception for domestic relations orders meeting specific standards, this is, qualified domestic relations orders. Domestic relations orders not meeting the qualification requirements would continue to be preempted under ERISA and considered prohibited assignments and alienations under both ERISA and the Internal Revenue Code until they are modified to meet such requirements. To protect plans and participants, the bill invokes specific provision for when benefits can commence, the form in which they can be paid, the present value of the amount on which they are based, and the non-duplication in the event of multiple orders....*[The REA will] make it clear that the bill generally does not define or restrict the marital property interest in retirement benefits as determined under state law.*"[52]

Congressman Erlenborn's comments in the Congressional Record may seem convoluted from the viewpoint of some court interpretations of the REA,[53] however, they come from a person that had sponsored his own ERISA legislation and been very involved in the passage of the REA. It is safe to assume in light of other comments in the Congressional Record on this day that Rep. Erlenborn's comments make good sense. For the purpose of the case at bar, his remarks are analyzed in three sections:

1) The original preemptions of state law under ERISA are preserved and clarified.[54] As set out above the preemption as applied by federal courts then universally provided an exception to state laws that defined marital property rights as to pension benefits. That Rep. Erlenborn was aware that state laws defining marital property rights in pension plans were exceptions from preemption can be of little doubt. The author of the bill had prepared a summary of comparisons to the existing law, HR 4280 and the Senate bill.[55] With regard to the preemption issue the summary read as follows:

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[51] *Ibid* at 23488-23492.

[52] *Ibid.* at 23481-23482, emphasis added.

[53] *See, e.g. Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991).

[54] For example, those dealing with hospital regulations, insurance fraud claims and subrogation, state laws that refer to ERISA, etc.

[55] 130 Cong. Rec. (House) at 23483-23484. The summary is a common practice in legislatures and is often read more widely by the membership than the actual bill itself. The Congressional Journal at 23482 reflects that a different section of the REA was the subject of another such summary.

"C. Special rules for assignments in divorce, etc...Proceedings

1. ERISA preemption

Present law---ERISA preempts all state laws that are *inconsistent* with its provisions. *Some courts have created an implied exception for domestic relations law.*

House bill—qualified domestic orders are excepted from the ERISA preemption provisions.

Senate bill---No ERISA preemption exception is provided.

Senate amendment to HR 4280 adopts house provision.[56]

2) A well-defined exception for QDROs meeting specific standards is carved out. Domestic relations orders not meeting the qualification requirements would continue to be preempted under ERISA and considered a prohibited assignment and alienation until they are modified to meet such requirements. When speaking of marital property rights in pension funds, Rep. Erlenborn only speaks of orders, not laws being preempted, meaning that such order will not be recognized under the plan for payment. The requirements of the orders are obviously more procedural than substantive because Rep. Erlenborn contemplates that they can be modified to meet QDRO requirements without the property rights in the pension being defined by ERISA, but instead by the states. The sections which define a QDRO are drawn expansively. Indeed, the familiar, perplexing term, "relates to," is used to define a domestic

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[56] *Ibid.* at 23484. Rep. Erlenborn stated that he concurred with the examples provided by the author that illustrate the true intent of the QDRO provisions in the legislation. The examples to follow illustrate the operation of the QDRO as set out in the summary.

order.[57] Other than these broad provisions a QDRO only requires that the order provide certain information and that it not harm the actuarial soundness of the pension plan.

It is significant that the final remedy under the REA, if no QDRO is presented to the administrator of the plan, is that the plan's obligation is terminated to the extent of past payments made. There is no loss of property rights under state law, only the loss of a right of action against the plan.[58]

3) The object of the bill is to regulate the retirement plans, not retirement benefits. The bill makes specific provision for when benefits can commence, the form in which they can be paid, and the present value of the amount on which they are based, and the non-duplication in the event of multiple court orders and makes clear that the bill generally does not define or restrict the marital property interests to retirement benefits as determined under state law.

Rep. Erlenborn's view of preemption of state property law by the REA is unanimously endorsed by those who played a major role in the passage of the House bill.

The author of the bill, Rep. Clay, was concerned that its provisions may be misconstrued: "Because the provisions will be

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[57] 29 U.S.C. §§1056(d)

ii. the term "domestic order" means any judgment, decree, or order (including approval of a property settlement agreement) which---

I. Relates to the provision of child support, alimony payments or marital property rights to a spouse, former spouse, child or other dependent of a participant...

[58] 29 U.S.C. §1056(d)(ii)(I).

interpreted by domestic relations lawyers and judges, who generally may not be familiar with pension laws, it is very important that the rules in this area be clear."[59]

So concerned about future misconstruction of his bill, Rep. Clay outlined four extensive examples to illustrate the function of the REA in marital property rights.[60] All four examples begin with "The state court, applying the domestic relations law of state A...." The terms "marital property rights" and "domestic relations laws" appear to be used interchangeably in the context of Rep. Clay's examples.

The second example (Example 2) given by Rep. Clay is particularly illustrative for the purposes of the case at bar: The participant spouse (P) has married twice, spouse one (S1) and spouse two (S2):

> "Assume the domestic relations order permits S1 to begin receiving her court awarded interest at any time after P attains age 55. When P attains age 55, S1 elects to begin receiving her interest in the form of a 60-month certain and life annuity. She designates her son as the beneficiary of any benefits payable if she dies before receiving the 60 months of guaranteed payment---"[61]

Example two is particularly devastating to any argument that Congress could not have contemplated that the child of a former spouse could receive retirement benefits that could

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[59] 130 Cong. Rec. (House) at 23486.

[60] *Ibid.*

[61] *Ibid.* at 23487. The example is lengthy, but shows that such a transmission to an heir is permitted.

otherwise go to a participant or his surviving spouse.[62] Example 2 does not even require the son of S1 to be the son of P!

Example 3 is also pertinent to the *Boggs* case. It illustrates the result where state law vests S1 with an interest in the retirement benefit of P. In this example S1 and S2 divide P's survivor annuity upon P's death.[63]

Rep. Clay concluded his examples with the statement that the REA, his legislation, "assures that the trauma of divorce is not followed by the refusal of a pension plan to honor a legitimate *state court* order awarding the ex-spouse a portion of the worker's benefit."[64]

Rep. Clay made a real effort to explain carefully that (1) state marital property law is not preempted by the REA, (2) the REA contemplates retirement benefits going to the children of a former spouse, and (3) a former spouse may share benefits with a present spouse.

Representative Renaldo, original co-author of the REA legislation, on August 9, 1984, spoke of the key elements of the bill:

> "[T]he legislation resolves an ambiguity in existing law by clarifying that a judge may divide pension benefits between the spouses pursuant to alimony, child support and property settlement orders and decrees. Some participants and employees have alleged that the federal

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[62] See P.Brief at 27; *Ablamis, supra*; S.Brief at 29.

[63] 130 Cong. Rec. (House) at 23487.

[64] *Ibid.* at 23488. Emphasis added.

preemption and antiassignment provisions of ERISA prohibit such divisions."[65]

Representative Regula also commented that the REA "clarifies [that] assignment of pension benefits by state divorce courts in cases related to alimony, child support and marital property rights is permitted.[66]

These members were not making general statements about preemption. Their comments were specific, direct and unanimous as to state community property law. It was not preempted. There appears to be little here to change the overwhelming jurisprudence that concurred with that position at the time the REA was enacted.

The strong unified congressional intent is clear. The QDRO was designed to facilitate benefit plans to function in the context of state marital property laws. The purpose was to require needed information, assure actuarial soundness, and a procedure to relieve benefit plans of liability in protracted marital property disputes. The QDRO is an effort in cooperation in its truest sense. It was intended as a reaffirmation of the state governance of marital property rights and gives those regulated by Congressional act, plan administrators, a procedure for that governance.

For a court to hold that the REA preempts state marital property rights not only divests a state of its traditional power in that realm but deprives Congress of the power to fashion law in accordance with its clear intent.

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[65] *Ibid.* at 23490.

[66] *Ibid.* at 23491.

It is maintained by Petitioner and the United States that through the REA Congress enacted extensive law dealing with the partitioning of pension benefits as to spouses.[67] This is false. The only changes made were to require that a joint survivor benefit be a part of a retirement plan with the surviving spouse(s) entitled to a 50% interest.[68] Prior to REA, the law required that *if* such an annuity existed, then the surviving spouse was entitled to 50%[69]. Under REA, the annuity can be waived with the written consent of both spouses.[70]

Other than these modifications, the vast bulk of ERISA law in effect concerning benefits vis a vis a spouse was contained in the 1974 ERISA legislation that was consistently held by our courts not to preempt the marital property rights of our states. It is incredible that such adjustments to such a large body of federal law, ERISA, could or would be intended to upset such settled jurisprudence as was that of the exception of state marital property law from the preemption clause of ERISA. This is particularly the case in view of the clear statements on the REA's intent by the leaders of the effort to adopt the measure, made immediately *prior to* the vote by the House!

Petitioner argues that to recognize state marital property rights would cause an unworkable situation for plan

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[67] P. Brief at 17, Judge Wiener's dissent in *Boggs*, S. Brief at 17-20.

[68] 130 Cong. Rec. (House) at 23484.

[69] *Ibid.*

[70] *Ibid.*

administrators.[71] This is unfounded and evidences a lack of understanding of the purpose and common-sense application of the QDRO. The QDRO was designed to preclude claims against the plan itself unless the requirements of the QDRO are met. Litigation by heirs against the plan by subsequent heirs of heirs of beneficiaries, administrators making diverse calculations based on varied state laws, calculations of rights of workers who have moved between jurisdictions is not the job of the administrator. The QDRO is required to provide that information to the administrator of the plan. That burden and right to make those decisions clearly rests with the state courts deciding state law.

As set out previously, the clear intent of the QDRO is not to define property rights under state law but to impose requirements insofar as the collection of funds from the plan to enforce these rights. The sanction for failing to produce a QDRO to a plan administrator is that the plan is relieved of liability for payments made—not the forfeiture of property rights under state law.

To preempt state property law would void the purpose of the QDRO which is to provide that pension plans can operate efficiently under those laws.

The Boggs children seek to enforce a right which in no way touches the pension plan. Their ability to pursue their rights outside of administration certainly is not preempted.

The conclusion of the Fifth Circuit is well reasoned. It is sensitive to both the laws of our states and the federal interest in the efficient operation of pension benefit plans. To quote:

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[71] P. Brief at 22-23; S.Brief at 25.

"Nothing is sought from the plan or its fiduciary. No duty will be imposed on the plan or the administrator....This is no greater effect than the states' garnishment laws. *Mackey v. Lanier Collection Agency and Service, Inc.* 486 U.S. 825 (1988)."

VI.
Anti-alienation Under QDRO

29 U.S.C. §1056(d) sets out:

"(d) assignment or alienation of plan benefits
(1) Each pension plan shall provide that benefits provided under this plan may not be assigned or alienated.

* * *

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit *payable* with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order. (Emphasis added).

The word "payable" must mean those payments which the plan is currently obligated to pay. The interpretation is further tempted by the immediately following sentence, which requires pension plans to provide for payments of benefits. There is no authority for anti-alienation protection for benefits

"paid."[72]

However, this interpretation is determined in 26 CFR §1.401(a)-13, made pursuant to rule-making authority over the pension plans that are mandated under the QDRO relative to the anti-alienation provisions.[73]

> **26 CFR § 1.401 c** provides:
> (C) Definition of assignment and alienation---(1) in general. For purposes of this section, the terms "assignment" and "alienation" include---
>
> * * *
>
> (ii) any direct or indirect arrangements (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest *enforceable against the plan*, in, or to, all or any part of a plan benefit payment which is, or may become, payable to the participant or beneficiary. (Emphasis added).

This rule has been interpreted in the *Guidry* case to mean that prohibition against alienation applies only to actions against the pension plan and not as a bar to actions against the beneficiary.[74]

The history of the *Guidry* case is most relevant to the case at bar. *Guidry* is the sole case cited by the Ninth Circuit *Ablamis* in applying the REA antialienation clause and it is the only case concerning antialienation of ERISA benefits cited in the Brief of the United States.[75] We cite *Guidry* here as a watershed case to permit funds that have been paid to participants or beneficiaries to be freed from federal non-alienation regulations. It is a very interesting case for purposes of analyzing *Boggs*.

Mr.Guidry was found to be liable to his union for embezzlement and the union obtained a judgment against him in the amount of $275,000. When the union attempted to execute the judgment against Guidry's pension benefits, he raised the issue of antialienation of pension benefit monies. The district court ordered that Guidry's benefit payments be put in a constructive trust in the union's favor.[76] The Tenth Circuit affirmed that decision.[77] On *certiori*, the U.S. Supreme Court reversed and remanded the case[78] stating that even in the case of fraud it would be inappropriate to allow alienation of benefits payable to a participant, thereby judicially creating an exception

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[72] According to Webster's New Twentieth Century Dictionary of the English Language, Unabridged, 1956, 2ed. Vol. 2, "payable" is 1. that can be paid. 2. that is to be paid (on a specific date); due. 3. that is or can be profitable, as a mine or a business venture. "Paid" is the past tense and past participle of "pay" and is defined as 2.(a) given in payment, as money (also with *out*); (b) discharged; settled, as a debt (also with *up*).

[73] *Trucking Employees of North New Jersey Welfare Fund, Inc. v. Robert Coville*, 16 F.3d 52 (3rd. Cir. 1994).

[74] *Guidry v. Sheet Metal Workers National Pension Fund*, 10 F.3d at 704 (10th Cir. 1993), *on reh'ing* 39 F.3d 1078 (10th Cir. 1994), *cert. denied* 115 S.Ct. 1691; *Trucking Employees of North New Jersey Welfare Fund, Inc., supra*; *Velis v. Kardanis*, 949 F.2d 78 (3rd. Cir.1991).

[75] S. Brief at 14.

[76] 641 F.Supp 360.

[77] 856 F.2d 1457.

[78] 493 U.S. 365.

to the REA antialienation provision. This is the decision cited by the *Ablamis* court and the United States in its brief herein.

But that was far from the end of the *Guidry* saga. The funds of the constuctive trust were released to Guidry, and he placed them in a bank account. *The union then garnished the bank account.* Again, Guidry filed suit, raising the same antialienation provision. In that case (which we will call *Guidry II*), the district court ruled in Guidry's favor, stating that "so long as the proceeds [of the pension benefit payments] are clearly identified as such and have not been co-mingled with other funds or used for the acquisition of assets" they continue to be protected by the anti-alienation provisions of ERISA.

Wrong again. In *Guidry II* on appeal to the Tenth Circuit[79], that appeals court reversed the district court, stating that once the pension benefit funds were paid, the anti-alienation protecitons of ERISA are no longer afforded to the participant or beneficiary. This was again reaffirmed on rehearing, and the U.S. Supreme Court denied *certiori*.[80]

Citing 26 CFR §1.401(a)-13 and *Trucking Employees of N.J. Welfare Fund, Inc.* (decided between the initial circuit court ruling and rehearing) and *NCNB Fin., Inc. v. Shumate*[81], the Tenth Circuit held in *Guidry II* on appeal that ERISA Section 206(d)(1) protects ERISA-qualified pension benefits from garnishment only until paid to and received by plan participants

[79] 10 F.3d 700 (10th Cir. 1993).

[80] 39 F.3d 1078; *cert. denied* 115 S.Ct. 169.

[81] 829 F.Supp 178 (W.D. Va. 1993).

and beneficiaries.[82]

With its decision in *Boggs v. Boggs*, the Fifth Circuit joins the Tenth and Third circuits, along with a Virginia district court decision, in a plain spoken, common-sense approach:

> "ERISA is concerned not so much with what the beneficiary does with his pension checks or how they are spent but whether those in charge actually deliver those benefits."[83]

Under the holdings of these cases, it is clear that the anti-alienation provisions of ERISA do not prohibit the sons of Isaac Boggs from claiming their inheritance from their mother.

The Louisiana laws on property and inheritance, delineated in Section II of this brief, should be mentioned again here. There is no way under Louisiana law that the sons of Dorothy and Isaac Boggs could be transfered a right to a "benefit payable" under the plan. Their father enjoyed the usufruct of their mother's interest in the retirement plan, so that all payments of benefits were required to be paid to Isaac for his lifetime. Therefore, there was no transfer of "benfits payable" under the plan.

The language of the anti-alienation provision of the U.S. Treasury regulations[84], and the solid and overwhelming jurisprudence and legislative history declare that there is a *great*

[82] See also *Velis, supra,* and *First Bank of Linden v. Sevina*, 43 F.3d 637 (11 Cir. 1995).

[83] *Boggs, supra.*

[84] 26 CFR §401(a)-13.

distinction between the terms "benefits payable" and "benefits paid." The Fifth Circuit is right and their judgment should be affirmed.

VII.
The IRA Account

Petitioner argues that the funds in the IRA account are to be accounted as proceeds from the investments made by Dorothy and Isaac. The Fifth Circuit saw through this attempted cloaking in ERISA, by ruling that the provision relied upon by Sandra was not intended to determine property rights to the money that was used to fund the IRA account.[85] It is worth noting that the decision of the tax court in *R.L. Powell v. The Commissioner of Internal Revenue*, 101 TC 489 (1993) finds contrary to Petitioner's position.[86]

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[85] *Boggs, supra.*

[86] In determining whether Flora, the ex-spouse of Rodney, was a distributee within the meaning of section 402(a)(1) they looked at the meaning of "alienate" in light of the anti-alienation provisions of section 401(a)(13), using the dictionary. "Alienate" means "to convey or transfer to another (as title, property or right): part voluntarily with ownership of." They found that by virtue of California community property law, Flora's rights in the qualified employee savings plan of Rodney were acquired by her directly at the outset of the community and did not represent a transfer of her rights which had previously accrued to Rodney. This case shows (1) that a federal court believed that it must (and did) apply state community property law substantive provisions even when the federal statute is implicated, and (2) Dorothy's rights in the ERISA plan in the case at bar were never "transfered" under the plain meaning of the term, but were acquired by her directly in the community, and her heirs inherited by operation of Louisiana seizin, and thus no transfer occurred. Neither acquisition of rights was voluntary. Thus, as in the tax court case, no prohibited alienation could have occurred.

The Fifth Circuit's position is bolstered by a reading of 26 CFR §1.401(a)-explanation .1395. This rule states that anti-alienation provided for in the Internal Revenue Code "applies as a condition to qualification rather than a positive legal command"; so much more would this be true on the decision of property rights.

Undoubtably, the Fifth Circuit could envision and feared the havoc that would ensue if a spouse could take community funds and establish an IRA that would cheat the other spouse from funds in a community property settlement.

VIII.
The Judgment of Possession in Dorothy's Succession Meets the Criteria of a QDRO

The Judgment of Possession in the Succession of Dorothy Boggs was rendered on February 5, 1980. It should be, after amended to meet the reporting requirements, considered as meeting the criteria for a QDRO. Although a plan administrator may treat this judgment as a QDRO, under law, because it was rendered prior to January 1, 1985 (the effective date of the REA)[87], this Court should take the opportunity presented by the case at bar to rule that an order in a probate meets the criteria of a QDRO.

In *Ablamis, supra* at 1456, the Ninth Circuit held that a probate order could not be a QDRO. This seems ill-considered.

The domestic relations order requires that it "relate to" marital property rights and is made pursuant to a state domestic

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[87] See Section 302 of the REA.

relation law (including community property law).[88] The expansive language in the ERISA preemption clause is idential to that defining the domestic relations order for QDRO purposes.

When the same words are used in different sections of the law they should be afforded the same meaning.[89] The term "relates to" has been held to have expansive and deliberately broad meaning.[90] Under the interpretations of the term "relates to" it is obvious that the judgment of possession in Dorothy's succession relates to marital property rights. Indeed, all that the judgment does is delineate rights which she acquired during the existence of the community of Dorothy-Isaac. That the judgment is rended pursuant to community property law is clear on its face. It recognizes Isaac's share in the community proerty and distributes hers. It is based on the community property laws of Louisiana. The complete statutory language of ERISA coupled with statutory language and jurisprudence, shows that the judgment of possession meets the QDRO criteria.

Congressional intent in the adoption of the REA, in particular the examples given by its author, clearly show that it was contemplated by Congress that non-employee spouses could leave their interest in a pension to an heir.[91] It is worth noting that the executive branch of government uses Rep. Clay's examples in interpreting the intent of the REA. The Code of

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[88] 29 U.S.C. §1056(d)(B)(ii).

[89] *Harline v. Harline*, 950 F.2d 669, 674 (10th Cir. 1991).

[90] *Boggs, supra.*

[91] See example 2 in comments of Rep. Bill Clay, discussed in detail, *supra.*

Federal Regulations specifically incorporates Rep. Clay's August 9, 1984 comments in explanation of the rules contemplating the inheritance of marital retirement rights.[92] Further, Section 1.123 of the same rule states that it would be possible for a spouse to bequeath her share in a pension benefit, but that her probate judgment must provide that payments are to be made to a child or other dependent, in order to meet QDRO requirements This would be the case in *Boggs.*

We urge that this Court follow the clear intent of Congress and the interpretation of it by the executive branch and rule definitively that a probate or succession order may meet the criteria of a QDRO.

To do otherwise would have the result that a spouse may only preserve their individual rights in a pension by dissolving their economic partnership---the same partnership REA, by its stated purpose, seeks to preserve.[93] Certainly, Congress did not intend that the only way that a spouse could protect their right in pension benefits is through a divorce or community property dissolution agreement.

CONCLUSION

The pages of the Congressional Journal come alive with the hopes and pride that the architects of the Retirement Equity Act felt with its imminent passage on August 9, 1984. Without exception, each sponsor described it as a recognition of marriage as an economic partnership.[94] How ironic that their efforts

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[92] See 26 CFR §§1.401(a)-13, 1.136, 1.401.

[93] See the dissenting opinion in *Ablamis, supra* at 1468.

[94] 130 Cong. Rec. (House) at 23481-23492.

would be used today in an attempt to deny the children of a majority contributor to a retirement investment their legacy, and in doing so deny her rights in those investments. The Petitioner proclaims that Dorothy Boggs had no rights in her spouse's retirment funds, and uses the REA as her authority. How ironic it is that the equal rights of Louisiana spouses, a right that they have enjoyed and depended upon for generations, a right that is our legacy, a right that is more refined and protective than federal law, would be threatened by the actions of these redacters of the REA, despite their fervent statements that such is not their intent.

Petitioner has searched all the way to this Court for an exemption from the duty imposed upon all similarly situated people in Louisiana, that is, to account for the use of property that is not hers.

It is the Petitioner who seeks the exception in this case--an exception that would allow her to keep the funds of a non-employee spouse, a direct contravention of the intent of the law that she seeks to use as a shield.

There is no reason to find preemption of Louisiana law in this case. Such action would violate the clear intent of Congress and cause a final disruption to solid juriprudence that holds that marital property rights are the province of the state. With this case, the Court has the opportunity to settle this matter and provide predictability in this area of law.

If spouses lost the right to bequeath or transmit a major portion of their estate, pension benefits, to their heirs, this eventually will discourage participation in retirement pension plans. Such a ruling would prohibit spouses from taking full advantage of the benefit of the federal estate tax credit. In the final analysis, it would give inferior rights to a predeceased, non-

employee spouse in the right to transmit or make a bequest.

The Fifth Circuit's holding with regards to the anti-alienation provisions is a sound one. It makes good sense. If payments already made to beneficiaries come under the anti-alienation protections of ERISA, then no lender could feel secure in collateral held. Each pledge, assignment or mortgage would need to be executed with evidence that the collateral was not acquired with or consisted of benefits paid from retirement plans. Debtors could hide from creditors indefinitely and over generations by making sure their assets are held in retirement plans.

We find no authority for the application of anti-alienation protections for funds paid by private pension plans and therefore question the federal interest sufficient to preempt state law which would decide the post-distribution ownership of those funds.This is no greater effect than the states' garnishment laws.

The decision of the Fifth Circuit is a sound one and should be affirmed. The children of Dorothy Boggs should inherit her estate---under the laws of the state of Louisiana---not the second spouse of her husband.

Respectfully submitted:

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December, 1996

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FOR ARGUMENT

(12)

NO. 96-79

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS
Petitioner

vs.

THOMAS F. BOGGS, HARRY M. BOGGS
AND DAVID B. BOGGS
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER
ON THE MERITS

REPLY BRIEF OF PETITIONER

May it please the Court:

Petitioner respectfully submits this brief in reply to the briefs of the Respondents, and the State of Louisiana.

Initially, we point out that since the constitutionality of Louisiana's community property laws is not drawn into question, the State of Louisiana has no standing to file a brief in this matter pursuant to Rule 294 (c), as it has done.

The position asserted by Respondents and supported by

the State's Brief, is that Respondents can circumvent the preemption clause of ERISA (29 USC sec. 1144 (a)) by contending that they are not claiming an interest in the pension plan, but only in the proceeds after distribution to the beneficiary.[1]

Interestingly enough, the authors of the State's brief admit that the deceased wife, Dorothy Boggs, did not receive any rights "*in rem*" in the pension plan[2] - indeed they acknowledge that "**Due to preemption** the first Mrs. Boggs could have no interest *in rem* in those [pension plan] funds". (State's brief p. 18) And, the Respondents likewise acknowledge that they have no interest in the "plan" and attempt to skirt the central issue of this case by claiming that: "The Boggs children seek to enforce a right which in no way touches the pension plan" (Respondents' brief p. 32), and "There is no way under Louisiana law that the sons of Dorothy and Isaac Boggs could be transferred a right to a 'benefit payable' under the plan". (Respondents' brief p. 37)

We respectfully submit, however, for the reasons set forth at pages 14-15, and pages 18-20 of Petitioner's original brief in response to the same erroneous theory announced by the Fifth Circuit's opinion that: "Our decision relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary" (82 F.3d at p. 97), trying to separate the benefits from the plan is a distinction without a difference, especially since **rights to the plan**

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[1] See eg. Respondents' brief at pp.5, 32, 33-34, 37-38, and State's brief at pp. 1, 5, 12.

[2] State's brief pp. 5, 16, 18

"benefits" are based on ownership rights to an interest in the "plan".

Congress was abundantly clear when it mandated that:

> "* * * the provisions of this title and title IV ***shall supersede any and all State laws*** insofar as they may now or hereafter relate to any employee benefit plan * * * ". 29 USC sec 1144 (a) (Emphasis added)

And, all parties and *amicus curiae* admit that preemption clause bars Respondents from claiming any interest in the plan. Without any rights in the plan, Respondents have no rights to an accounting, for they have no rights to the benefits payable under the plan, because they cannot do indirectly what they cannot do directly.

Respectfully submitted

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QUESTION PRESENTED

The United States will address the following question:

Whether the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, preempts the application of state community property law that would require the distribution of a portion of the deceased participant's pension benefits to the heirs of the participant's predeceased spouse instead of to the participant's surviving spouse.

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H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974) 12
H.R. Rep. No. 655, 98th Cong., 2d Sess., Pt. 1 (1984) 13, 15
S. Rep. No. 575, 98th Cong., 2d Sess. (1984) 14-15

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-79

SANDRA JEAN DALE BOGGS, PETITIONER

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND
DAVID B. BOGGS

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case concerns the scope of the preemption provision of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144. The Secretary of Labor is primarily responsible for enforcing and administering Title I of ERISA. See 29 U.S.C. 1002(13), 1136(b). The United States therefore has a substantial interest in the resolution of the question presented.

STATEMENT

1. This case involves a controversy over the retirement plan benefits of Isaac Boggs. Mr. Boggs was

employed by South Central Bell for 36 years, and was a participant in his employer's retirement plans, which were covered by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Mr. Boggs was married to his first wife, Dorothy Boggs, for the first 30 years of his employment, until her death in 1979. Pet. App. A1, A2, A4, A14. Dorothy Boggs' will devised to Mr. Boggs one-third of her estate and a lifetime usufruct in the remaining two-thirds; she devised to respondents, her three sons, the naked or reversionary interest in the two-thirds of the estate to which Mr. Boggs had the usufruct. *Id.* at A2, A14. The Sworn Descriptive List of Dorothy Boggs' property stated that she had a one-half interest, valued at $21,194.29, in Mr. Boggs' account in the Bell Systems Savings Plan for Salaried Employees (Savings Plan). *Id.* at A2, A14-A15.

In 1980, Mr. Boggs married petitioner. Pet. App. A2, A14. Upon Mr. Boggs' retirement in 1985, during the second marriage, he received several benefits from his employer's pension plans. Specifically, Mr. Boggs received, from the Bell South Service Retirement Program, monthly annuity payments in the amount of $1,777.67 from the date he retired until he died in 1989. He also received a lump-sum distribution from the Savings Plan in the amount of $151,628.94, which he "rolled over" into an Individual Retirement Account (IRA) qualified under the Internal Revenue Code, 26 U.S.C. 408. Finally, he received 96 shares of AT&T stock from the BellSouth Employee Stock Ownership Plan (ESOP), and life insurance policies. Pet. App. A2-A3, A14.[1]

[1] The monthly annuity payments apparently were paid from the Bell South Service Retirement Program, which is a "defined benefit plan" within the meaning of 29 U.S.C. 1002(35), because the benefits received were calculated on a service and salary formula. See Stip. Doc. F-2. The ESOP stock distribution apparently came from the BellSouth Employee Stock Ownership Plan, an "individual account" or "defined contribution" plan within the meaning of 29 U.S.C. 1002(34). The ESOP, a type of benefit plan described in 29 U.S.C. 1107(d)(6), appears to meet the definition of a pension (as opposed to welfare) plan under 29 U.S.C. 1002(2)(A), because the only distribution of stock occurred at Mr. Boggs' retirement. Stip. Facts ¶ 15. The Bell Systems Savings Plan, from which Isaac Boggs received a lump sum distribution upon retirement, also appears to have been an "individual account" or "defined contribution" plan, and was clearly a pension plan. See Stip. Docs. F-1, G; Stip. Facts ¶ 11. It is that Savings Plan that was specifically mentioned in the Succession and Sworn Descriptive List of Dorothy Boggs, the predeceasing first spouse. Stip. Docs. D, E. Upon Mr. Boggs' retirement, the proceeds from the Savings Plan were placed in an Individual Retirement Account. Stip. Facts ¶ 11.

Mr. Boggs died in 1989. After his death, his monthly retirement annuity converted to a survivor annuity payable to petitioner, as the surviving spouse, for the rest of her life. See 29 U.S.C. 1055(a)(1) and (d); Pet. App. A2, A14. In addition, petitioner was the named beneficiary of the IRA and the life insurance policies. Pet. App. A2, A14.[2]

2. Two of the three respondents brought an action against petitioner in state court asserting their entitlement, under Louisiana law, to what they alleged to be the community property interest of their mother

[2] In his will, executed three months before his retirement, Mr. Boggs bequeathed the family home to petitioner outright, and also bequeathed to her a life usufruct in his separate and community property. He bequeathed to respondents the naked (reversionary) ownership of the remainder of his estate, subject to petitioner's life usufruct. Stip. Doc. A.

in Mr. Boggs' pension benefits. Pet. App. A3, A15. Louisiana's community property law provides that "[e]ach spouse owns a present undivided one-half interest in the community property." La. Civ. Code Ann. art. 2336 (West 1985).[3] In Louisiana, pension benefits acquired during the marriage are generally considered community property that vests equally in both spouses when acquired, even if those benefits are not payable until after the marriage ends. Pet. App. A4, A20. Respondents' state court action sought an accounting and payment based on a portion of the monthly retirement annuity paid to Mr. Boggs until his death, the monthly survivor annuity payable to petitioner for the rest of her life, the ESOP shares of AT&T stock, and the IRA. *Id.* at A3.

Petitioner then brought this action in federal district court pursuant to Section 502(a)(1)(B) of ERISA, 29 U.S.C. 1132(a)(1)(B). Petitioner sought a declaratory judgment that ERISA preempts the application of Louisiana's community property and succession laws to the assets and benefits in Mr. Boggs' pension plans and IRA. Pet. App. A3-A4. On summary judgment, the district court held that "ERISA does not preempt Louisiana's community

[3] Community property is defined to include "property acquired during the existence of the legal regime through the effort, skill or industry of either spouse," "property acquired with community things," and "natural and civil fruits of community property." La. Civ. Code Ann. art. 2338 (West 1985). We assume for purposes of this case that, under Louisiana law, Dorothy Boggs had a one-half interest in the assets of Mr. Boggs' pension plan during her lifetime, and that she devised the reversionary interest in that one-half interest to her children.

property law," *id.* at A5, and entered judgment for respondents, *id.* at A10-A11.

3. A divided panel of the court of appeals affirmed. Pet. App. A13-A24. The court noted that "ERISA was enacted to protect the interests of the beneficiaries of employee benefit plans," *id.* at A16, and acknowledged that "Congress attempted to guarantee uniformity when it included ERISA's broad preemption provision," 29 U.S.C. 1144. Pet. App. A17. The court also acknowledged that the preemption provision "has been interpreted broadly" and may supersede a state law even if that law "is not designed to regulate in the area of employee benefits or if its effect is indirect." *Ibid.* The court nonetheless noted that ERISA's preemption provision "is not without limits," *ibid.*, and that the courts "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system," *id.* at A18. The court found it significant that "[t]he area of domestic relations has long been the domain of the states," and that Louisiana's community property system is an "honored civilian institution," *id.* at A19.

From those premises, the court concluded that the application of state law to give Dorothy Boggs (and her devisees) a one-half interest in Isaac Boggs' pension plan assets does not "relate to" an ERISA plan, within the meaning of 29 U.S.C. 1144. The court stated that "[a] state community property system that affects what a plan participant does with his benefits after they are received does not impermissibly intrude on the mandates ERISA imposes on plan administrators." Pet. App. A20. The court observed that respondents sought "[n]othing * * * from the plan or its fiduciary," that "[n]o duty will be imposed on the plan or the administrator," and that "[b]enefits

will continue to be paid to the beneficiary in the manner provided in the plan." *Id.* at A21. The application of state law in this case, the court concluded, "relates not to the plan but to the disposition of the proceeds only after payment to the designated beneficiary." *Ibid.*

The court rejected the argument that ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1), supports preemption of state law that divides, or creates competing ownership interests in, ERISA benefits. Initially, the court reasoned, it is ERISA's "general preemption provision," 29 U.S.C. 1144(a), that "controls any determination of the boundaries of ERISA preemption." Pet. App. A22. The court also concluded that the anti-alienation clause was intended only "to prevent plan participants from recklessly divesting themselves of plan benefits before retirement," and "was not intended to affect support obligations among the members of a family." *Ibid.* In addition, the court reasoned, under state law Dorothy Boggs had an "ownership" interest in the pension benefits that "vest[ed] immediately," and thus "no transaction prohibited by the ERISA spendthrift provision" would occur if Dorothy Boggs were found to have an ownership interest in those benefits. *Id.* at A22-A23. Nor, the court stated, did the anti-alienation clause bar Dorothy Boggs' bequest to respondents because "[t]his final alienation, two steps removed from the disbursement of benefits, is not a violation" of ERISA's provisions. *Id.* at A23.[4]

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[4] The court of appeals also rejected petitioner's reliance on 26 U.S.C. 408, which governs IRAs and was enacted as part of ERISA. Pet. App. A24. Section 408(g) states that the provisions governing IRAs in Section 408 of the Internal Revenue Code shall be applied "without regard to any community property laws." 26 U.S.C. 408(g). In the court's view, Section 408 governs "the trust relationship between the government and the [plan] participant" concerning the disbursement of IRA funds but could not "reasonably be interpreted to intervene in the marital relationship and divest one spouse of ownership rights," and thus could not affect the participant's "later obligation to his spouse to account for her portion of the benefits." Pet. App. A24.

Judge King dissented. Pet. App. A25. She would have held that ERISA preempts the application of state law "that would operate here to divest a participant's widow of a portion of the benefits from pension plans that she would be entitled to receive under ERISA." *Ibid.* Five days after the petition for a writ of certiorari was filed in this Court, six judges of the court of appeals filed a dissent from the court of appeals' failure to rehear the case en banc. Pet. Supp. App. A42-A75. Those dissenting judges concluded that "ERISA preempts Louisiana community property law to the extent that such law would purport to recognize and enforce an interest of the heirs of a nonparticipant spouse in an ERISA-qualified pension plan." *Id.* at A75.

SUMMARY OF ARGUMENT

ERISA preempts the application of state community property law to the benefits of a pension plan. ERISA itself provides some substantive law concerning entitlement to pension benefits, and ERISA otherwise leaves the formulation of pension benefits to the plan and the employer that establishes the plan. State law that purports to require the ownership or distribution of such benefits in a particular manner therefore "relate[s] to" the pension plan, within the

meaning of 29 U.S.C. 1144(a). The application of state community property laws to pension benefits could also interfere with plan administration. ERISA's broad preemption clause in Section 1144(a) therefore supersedes such state laws.

ERISA contains three provisions directly governing entitlement to plan benefits. First, the statute's anti-alienation provision, 29 U.S.C. 1056(d)(1), is intended to ensure that benefits are not diverted from the participant or beneficiary who is intended to receive them. Second, ERISA requires that most pension plans make provision for surviving spouses of plan participants, by ensuring that such surviving spouses receive an annuity or the entitlement to undistributed sums from a pension plan account. 29 U.S.C. 1055(a). Third, ERISA makes special provision for benefits to be paid to divorced spouses and dependent children of plan participants, by expressly permitting such ex-spouses and children to enforce a qualified domestic relations order (QDRO) against the plan, notwithstanding the anti-alienation and preemption provisions. 29 U.S.C. 1056(d)(3), 1144(b)(7). The QDRO provision does not extend to predeceased spouses or their heirs. Because ERISA thereby governs entitlement to pension benefits, any state law that would divide, or grant competing ownership interests in, such benefits is preempted.

In this case, the application of state community property law would directly conflict with ERISA's provision for a survivor annuity payable to petitioner. That annuity was mandated, as a matter of substantive federal law, by 29 U.S.C. 1055(a). Respondents claim a share of that annuity, by virtue of their inherited community property claim; any funds to

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ARGUMENT

ERISA PREEMPTS STATE LAW REQUIRING THE DISTRIBUTION OF PENSION BENEFITS TO PERSONS OTHER THAN THE PARTICIPANT, THE PARTICIPANT'S DESIGNATED BENEFICIARY, OR A STATUTORY BENEFICIARY SPECIFICALLY DESIGNATED BY ERISA

This case involves a matter that is at the heart of ERISA: the payment of retirement benefits from an ERISA plan. The outcome of this case will determine who is entitled to receive pension benefits under employee benefit plans governed by ERISA. Thus, this is unquestionably not a case in which application of state law would affect employee benefit plans in a "tenuous, remote, or peripheral" manner. See *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983); cf. *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1680 (1995). It involves, rather, the very subject to which ERISA itself is addressed.

The court of appeals believed that ERISA does not preempt the application of Louisiana community property law to the benefits at issue in this case because state law would not impose any particular duties on the plan *administrator*, such that the federal interest in uniformity of plan administration would be implicated. Pet. App. A20-A21. While we disagree with the court of appeals on that point (see pp. 24-25, *infra*), the more fundamental point is that entitlement to plan benefits is a subject of federal concern specifically addressed by ERISA. It is, therefore, a field in which state law is superseded, by

operation of ERISA's broad preemption provision, 29 U.S.C. 1144.[5]

1. ERISA establishes the regulation of employee benefit plans "as exclusively a federal concern." *Travelers*, 115 S. Ct. at 1677. ERISA "imposes participation, funding, and vesting requirements on pension plans"; it "sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, for both pension and welfare plans"; and it includes "a carefully integrated civil enforcement scheme that is one of the essential tools for accomplishing the stated purposes of ERISA." *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 137 (1990) (internal quotation marks omitted).

ERISA governs, with breadth and detail, the rights of pension plan participants and beneficiaries, as well as the obligations of the plan with respect to the payment of benefits.[6] Among those rights is the right of

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[5] Section 1144(a) provides in pertinent part: "Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title."

[6] ERISA defines a "participant" as "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * *, or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). It defines a "beneficiary" as "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. 1002(8). An "employee pension benefit plan" or "pension plan" is "any plan, fund, or program" that is "established or maintained by an employer" and "provides retirement income to employees" or "results in a deferral of income by employees." 29 U.S.C. 1002(2)(A).

the participant and beneficiary, protected by ERISA's anti-alienation provision, actually to receive the benefits from the plan. And among the rights and obligations are a number of carefully focused provisions requiring that pension benefits be paid, in specific circumstances, to particular individuals—surviving spouses, divorced spouses, and dependent children.

First, ERISA specifies that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1); see also 26 U.S.C. 401(a)(13) (parallel Internal Revenue Code provision). That anti-alienation provision was intended to ensure that the participant in, or beneficiary of, a retirement plan actually receives the benefits to which he or she is entitled. See H.R. Rep. No. 807, 93d Cong., 2d Sess. 68 (1974) (anti-alienation provision ensures that "the employee's accrued benefits are actually available for retirement purposes"). While the anti-alienation provision is directly concerned with preserving plan assets before their distribution to the participant or beneficiary, the manifest import and underlying policy of the clause is that pension benefits belong to the participant or to the beneficiary, and may not be diverted to others. Congress intended by that provision "to safeguard a stream of income for pensioners (and their dependents)." *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990); see also *id.* at 371-372.

Second, ERISA, as amended by the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426, establishes important rights to pension benefits for the surviving spouse of a participant. Section 205(a) of ERISA, as amended by the REA, requires all

defined benefit plans, and most defined contribution plans, to provide an annuity for such a surviving spouse. See 29 U.S.C. 1055(a); see also 26 U.S.C. 401(a)(11), 417(a) (parallel Internal Revenue Code provisions). If a married vested participant retires before death, the participant and spouse must receive a "qualified joint and survivor annuity," to protect the spouse's survivor interest. 29 U.S.C. 1055(a)(1). If a married vested participant dies before retirement, the surviving spouse must receive a similar "qualified preretirement survivor annuity." 29 U.S.C. 1055(a)(2). A defined contribution plan that does not guarantee such an annuity to a surviving spouse must provide the surviving spouse an alternative form of protection—specifically, the entitlement to any accrued benefits remaining in the plan at the time of the death of the participant. 29 U.S.C. 1055(b)(1)(C)(i).

Those protective provisions for surviving spouses were added by Congress in 1984 to address the problem of the surviving spouse who is "unprepared financially for the death of the participant (and the ending of the participant's annuity)," and who might receive no benefits at all after the death of the participant. H.R. Rep. No. 655, 98th Cong., 2d Sess., Pt. 1, at 28 (1984) (1984 House Report). Surviving spouses cannot be divested of their survivor benefits unless they expressly waive their rights to those benefits in notarized written statements. 29 U.S.C. 1055(c)(2).

Third, ERISA, as amended by the REA, has a highly specific provision intended to ensure equitable treatment of *divorced* spouses and certain dependents (such as minor children receiving child support) of participants in pension plans. ERISA requires a plan to pay a participant's pension benefits to an alternate

payee in accordance with a state "domestic relations order," if that order meets the detailed requirements that ERISA prescribes for a "qualified domestic relations order" (QDRO). 29 U.S.C. 1056(d)(3). If a valid domestic relations order meeting all the requirements of Section 1056(d)(3) is determined by the plan to be qualified, then the beneficiary of the QDRO becomes, in effect, a beneficiary of the plan as well. 29 U.S.C. 1056(d)(3)(J) and (K).[7] ERISA exempts from the anti-alienation clause only those QDROs that meet the requirements of 29 U.S.C. 1056(d)(3), and also expressly saves such QDROs from preemption, 29 U.S.C. 1144(b)(7). See *Guidry*, 493 U.S. at 376 n.18; *Mackey* v. *Lanier Collection Agency & Service*, 486 U.S. 825, 838 (1988).[8]

The "limited exception" to the anti-alienation provision for QDROs, see S. Rep. No. 575, 98th Cong., 2d

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[7] Section 1056(d)(3)(A) provides that "[e]ach pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order." A "qualified domestic relations order" is defined as a "domestic relations order" that "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan." 26 U.S.C. 1056(d)(3)(B)(i)(I). ERISA defines a "domestic relations order" as an order that "relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant" and is "made pursuant to a State domestic relations law (including a community property law)." 29 U.S.C. 1056(d)(3)(B)(ii).

[8] The amendments to ERISA made by the REA—which secure the surviving spouse's rights, create the QDRO exception to the anti-alienation clause, and save state laws providing for QDROs from preemption—were all in effect when Mr. Boggs retired in September 1985.

Sess. 19 (1984), was intended to address the serious problem facing divorced spouses who are economically dependent on their former spouses (the plan participants), as well as children who are similarly dependent on a parent-participant. See 1984 House Report 30-31. To ensure that ERISA does not interfere with alimony, child support, or the equitable distribution of property in a divorce, Congress expressly permitted the division of ERISA plan benefits pursuant to a QDRO. Congress made clear, however, that QDROs must "meet specific requirements if they are to be honored by the plan," in order to "minimize the burden on the plan and eliminate confusion over what the court is ordering." *Id.* at 39. Domestic relations orders that do not meet the specific requirements for a QDRO are not exempted from the anti-alienation clause. See 29 U.S.C. 1056(d)(3)(A) (stating that the anti-alienation clause in Section 1056(d)(1) "shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that [it] shall not apply if the order is determined to be a [QDRO]"). And only QDROs meeting those requirements are also exempted from preemption. See p. 14, *supra*; S. Rep. No. 575, 98th Cong., 2d Sess. 19 (1984).

ERISA thus includes special provisions to secure interests in pension benefits of surviving spouses, divorced spouses, and certain dependents of participants, in light of the particular, serious financial hardships faced by those persons. ERISA does not, however, contain any similar provision establishing or recognizing a right to plan benefits on the part of the estate of a spouse who predeceases the participant, or in that predeceased spouse's heirs. Moreover,

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entitlement to the surviving spouse annuity required by ERISA.

2. Under established principles, ERISA preempts state law when ERISA itself provides law governing an area. See U.S. Br. at 12-14, *De Buono* v. *NYSA-ILA Medical & Clinical Servs. Fund*, No. 95-1594.[10] That basis for preemption applies to this case. Because ERISA itself provides law concerning entitlement to plan benefits—by ensuring that participants and designated beneficiaries shall receive those benefits, and by making specific provision in the Act for surviving spouses, divorced spouses, and certain dependents—state community property laws necessarily "relate to" an ERISA plan when applied to plan benefits. Such laws are therefore preempted. See 29 U.S.C. 1144(a).[11]

a. It is clear that Louisiana community property law is preempted insofar as it may apply to petitioner's survivor annuity. Indeed, that state law conflicts directly with ERISA's provision for the payment of a survivor annuity to petitioner. ERISA specifies persons to whom a retirement annuity must be paid during a participant's lifetime and after his or her death. Section 205(a)(1) of ERISA provides that, in the case of a married participant who receives a retirement annuity, "the accrued benefit payable to

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[10] We are providing the parties with a copy of our brief in *De Buono*.

[11] The analysis and conclusions that follow are not dependent, however, on the fact that the state-law claims in this case arose under a community property law. The same result would obtain under any state law that purports to recognize, by operation of domestic relations or testamentary law, a beneficial interest in an ERISA plan superior to the designation of a beneficiary made pursuant to ERISA or the terms of a plan.

such participant shall be provided in the form of a qualified joint and survivor annuity," 29 U.S.C. 1055(a)(1), *i.e.*, an annuity "for the life of the participant with a survivor annuity for the life of the spouse." 29 U.S.C. 1055(d)(1). The participant may not elect to waive the qualified joint and survivor annuity form of benefit unless "the spouse of the participant consents in writing to such election," and the participant has designated "a beneficiary (or a form of benefits) which may not be changed without spousal consent." 29 U.S.C. 1055(c)(1) and (2). Under ERISA, only Isaac Boggs was entitled to receive the "joint and survivor annuity" during his lifetime. Because petitioner did not consent to any waiver of that annuity, she, and she alone, is entitled now to receive the survivor annuity, a necessary consequence of her having been married to the participant at the time of his retirement and her surviving his death.[12]

ERISA makes no similar provision for payment of an annuity to the estates or heirs of predeceased spouses of plan participants, or for the children of plan participants. There might, of course, be plausible reasons grounded in policy why Congress in the future might choose to permit the federal laws governing pension benefits to recognize such an interest. It must be borne in mind, however, that such an interest could be recognized only at the expense of the specific class of persons (surviving spouses) that Congress chose to protect in the REA when it re-

[12] Indeed, the survivor annuity came into existence only because Mr. Boggs remarried. Had Mr. Boggs not remarried, the survivor annuity in which respondents claim an interest would not exist.

quired the survivor annuity. In a case like this one, any funds for payments to the children or other heirs of a predeceased spouse would come, in effect, from the survivor annuity payable to the surviving spouse.[13] And since "[p]ensions are designed for the benefit of the living," *Ablamis* v. *Roper*, 937 F.2d 1450, 1457 (9th Cir. 1991), it is not surprising that Congress chose to prefer the interest of the surviving spouse of a retired plan participant, who may have no other source of income, over that of the heirs of a predeceased spouse, including the participant's own children, who may have a lifetime of gainful employment ahead of them. As Judge Wiener noted in his dissent from denial of rehearing en banc:

> Ever since the enactment of REA, ERISA has exhibited an extraordinary interest in protecting the surviving spouse of the participant employee, going so far as to trump the participant employee's own beneficiary designation if, absent spousal consent, the designee is not the participant's surviving spouse. By statutory enactment, then, Congress has elected to designate for each and every participant in an ERISA plan precisely who the "natural objects of his or her bounty" must be. And, in making that election, Congress has opted to elevate the nonparticipant spouse (or, in the case of divorce, the nonparticipant ex-spouse) above such presumptive candidates as the descen-

[13] Cf. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 585 (1979): "Congress has fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire. Any automatic diminution of that amount frustrates the congressional objective."

dants or other heirs, legatees or assigns of either spouse.

Pet. Supp. App. A64.

b. ERISA also preempts the application of state community property law to the assets of Isaac Boggs' defined contribution plans (*i.e.*, his stock and savings plans). This is so even though Louisiana community property law does not single out pension plan benefits, but makes those benefits subject to the State's general community property regime.[14] As this Court has noted on several occasions, under ERISA's preemption provision, which is "'conspicuous for its breadth[,]' * * * a state law may 'relate to' a benefit plan and thereby be pre-empted, even if the law is not specifically designed to affect such plans." *Ingersoll-Rand*, 498 U.S. at 138-139; see also *Pilot Life Ins. Co.*

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[14] As we understand this case, respondents claim to be entitled, collectively, to a share in Isaac Boggs' pension benefits by operation of Louisiana's general community property statute, La. Civ. Code Ann. art. 2338 (West 1985). Article 2338 provides that the community property includes "all other property not classified by law as separate property." *Ibid.* Louisiana law elsewhere provides specifically that an employee who is predeceased by his spouse shall enjoy a legal usufruct, during his life, of his spouse's community property interest in any recurring retirement benefits. La. Civ. Code Ann. art. 890.1 (West Supp. 1996). That provision does not appear to affect the outcome of this case, however, because Dorothy Boggs in any event bequeathed to Isaac Boggs outright the maximum permitted by law, and the lifetime usufruct of the balance of her estate, necessarily including any interest she had in his pension benefits. Accordingly, any claim of respondents to a share of Isaac Boggs' pension benefits appears to arise solely out of the *residual* interest devised to them by their mother. Their mother's interest to that extent arose under Article 2338.

v. *Dedeaux*, 481 U.S. 41, 47-48 (1987); *Shaw*, 463 U.S. at 98; *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981). The application of Louisiana's community property law to the benefits payable under an ERISA plan "relate[s] to" that plan "in the normal sense of the phrase, [in that] it has a connection with" the plan, *Pilot Life*, 481 U.S. at 47. Just as the application of Mississippi's general common law of tortious breach of contract, as applied to the processing of benefits under an ERISA plan, "relate[d] to" such a plan and "undoubtedly [met] the criteria for pre-emption" under Section 1144(a), see *Pilot Life*, 481 U.S. at 48, so too here, the application of Louisiana's general community property law to a determination of entitlement to plan benefits has an obvious connection with plans.[15]

Of course, the application of generally applicable state law to an ERISA plan may not result in pre-emption when an ERISA plan engages in an activity that is subject to traditional and generally applicable state regulation, and when that regulation is tangential to the central concerns of ERISA. See *Travelers*, 115 S. Ct. at 1683 (ERISA plan not immune from surcharges on hospital costs); cf. *Mackey*, 486 U.S. at 830-838 (employee welfare plans not exempt from general state garnishment statutes); see also U.S. Br. at 19-23, *De Buono* v. *NYSA-ILA Medical & Clinical Servs. Fund*, No. 95-1594. But this is not a case in which the application of the state law to the

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[15] The Court has said that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97; see *id.* at 97 n.16 (citing *Black's Law Dictionary* 1158 (5th ed. 1979)).

ERISA plan touches the concerns of ERISA only tangentially. Rather, the application of community property law to a participant's pension benefits relates directly to the purpose for which ERISA plans are put in place: the provision of benefits to employees.

c. The conclusion that ERISA preempts the application of community property law to pension plan benefits is reinforced by ERISA's anti-alienation provision, 29 U.S.C. 1056(d)(1). As we have explained (see p. 12, *supra*), that provision ensures that pension benefits are not diverted before they are distributed to the participant or beneficiary for whom they are intended. The court of appeals believed, however, that application of Louisiana's community property law would not interfere with the anti-alienation clause because Dorothy Boggs' ownership interest in her husband's pension benefits vested immediately, and therefore no transaction was needed to convey ownership to her. Pet. App. A22-A23.[16]

[16] The court of appeals also suggested that Section 1056(d)(1) could have no bearing on this case because the pension benefits that respondents claim have already been distributed. Pet. App. A23. While it may be true that the anti-alienation clause applies strictly only to prevent attachment of benefits before they are distributed, and not after they are received by the participant or beneficiary, the court of appeals' reasoning overlooks the important point that the ownership interest claimed by respondents must have arisen before the benefits had been distributed by the plan. At that time, however, Dorothy Boggs would have been prevented by Section 1056(d)(1) from using legal process to protect any state-law ownership interest she might have had in those benefits. See pp. 23-24, *infra*. The fact that respondents' claim based on their mother's interest was not brought until after the benefits had been distributed to their father is therefore not dispositive

We disagree with that reasoning, on three counts. First, application of community property law to create ownership interests in pension benefits surely "relate[s] to" the purpose for which the anti-alienation provision was put in place (preventing the diversion of such benefits from those designated by the participant or ERISA itself to receive them), and is therefore preempted. Indeed, 29 U.S.C. 1056(d)(3)(A) makes clear that the anti-alienation clause in Section 1056(d)(1) applies to the "creation" or "recognition" of rights in benefits, not merely the "assignment" of such rights.

Second, even if the application of Louisiana community property law does not contradict Section 1056(d)(1) directly, it still "relate[s] to" an ERISA plan in the areas covered by Section 1056, and is therefore preempted. See *Ingersoll-Rand*, 498 U.S. at 139 (state law need not be in conflict with ERISA to be preempted); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (same); *Shaw*, 463 U.S at 98-99 (same).

Third, even if Dorothy Boggs might under state law have been considered a co-owner of the pension benefits, her inability (because of Section 1056(d)(1)) to use legal processes to execute against those

of the legal issue. There is also no support for the court of appeals' suggestion that the anti-alienation provision was not intended "to alter traditional familial and support obligations," as opposed to providing protection against participants' "own financial improvidence in dealing with third parties." Pet. App. A5 n.1. To the contrary, the anti-alienation provison is "unqualified by the statutory text." *Guidry*, 493 U.S. at 376. And the REA's narrowly tailored exceptions to that provision refute the notion that it does not *generally* apply to family members, as well as others.

benefits obviously constitutes "a severe limitation on the nature of any ownership interest she might otherwise enjoy under state law." See *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 586 n.19 (1979); see also *Ridgway* v. *Ridgway*, 454 U.S. 46, 61 (1981); cf. *Guidry*, 493 U.S. at 371-372 (constructive trust on pension benefits violates ERISA's anti-alienation clause). As a result, quite aside from the more general preemption principles discussed above, the anti-alienation provision of ERISA overrides Dorothy Boggs' community property interest in Isaac Boggs' pension benefits.

d. Community property laws are also preempted in cases like this one because application of such laws to pension benefits could interfere with the administration of ERISA plans. Cf. *Shaw*, 463 U.S. at 99; *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9-12 (1987). Plans have an interest in knowing who the beneficiaries are, and in not being subject to suit by other persons asserting claims to the pension benefits. Although the court below stressed that the dispute is "between successive spouses[] and their heirs," Pet. App. A20, and that respondents sought nothing "from the plan or its fiduciary," *id.* at A21, there is no reason to believe that the community property interests that it recognized would be vindicated only after the participant or beneficiary has died. The next heirs in respondents' situation may well bring suit against the plan itself. Competing heirs from different states, asserting conflicting interests under various state laws, might also bring actions against the plan. The plan's interest, protected by ERISA, in avoiding a multiplicity of possibly conflicting state regulation is therefore substantially implicated in this case, and independently requires preemption. Cf.

Fort Halifax, 482 U.S. at 11; *Travelers*, 115 S. Ct. at 1677-1678.

3. Preemption of state law in this case is consistent with a line of similar cases in which the Court has held that various federal programs making benefits or assets available to specific individuals preempted the application of state domestic relations laws that would have divided those benefits or assets among family members, or would have created competing ownership interests.[17] In those cases, the Court found that statutory provisions designating specific beneficiaries of the federal program, anti-attachment provisions, or both in combination, required the conclusion that the operation of state law to divide or create competing ownership interests in the federal benefits or assets was preempted. Those cases involved benefits that were created by federal law, whereas this case involves benefits created by private ordering between employers and employees. That distinction is of no moment here, however, given the broad and exclusive sweep of federal law in the regulation of pension plans. See *Pilot Life*, 481 U.S. at 46.

The Court has charted a consistent course in this area. In *Wissner* v. *Wissner*, 338 U.S. 655 (1950), the Court held that California community property law could not be applied to the proceeds of a national servicemember's life insurance policy, where the officer had designated his mother rather than his wife

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[17] See *Mansell* v. *Mansell*, 490 U.S. 581 (1989); *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981); *McCarty* v. *McCarty*, 453 U.S. 210 (1981); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979); *Free* v. *Bland*, 369 U.S. 663 (1962); *Wissner* v. *Wissner*, 338 U.S. 655 (1950); cf. *Rose* v. *Rose*, 481 U.S. 619 (1987).

as the beneficiary of the policy. The Court stressed that the officer had a federal statutory right to designate the beneficiary of his policy, and that, by statute, payments to the named beneficiary were exempt from attachment. *Id.* at 658-659. In *Free* v. *Bland*, 369 U.S. 663 (1962), the Court held that the application of Texas community property law to the ownership of United States Savings Bonds was preempted; the Court noted that Treasury Department regulations specifically allowed savings bonds to pass by right of survivorship if so elected by the bondholder, and that no judicial determination impairing that right of survivorship would be recognized. *Id.* at 667-668. In *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979), the Court ruled that California community property law could not be applied, in a divorce decree, to divide an expectancy in receiving federal railroad retirement benefits. The Court observed that the benefits were protected from attachment under a statutory anti-assignment provision, subject only to a limited exception for child support and alimony (but not division of property). *Id.* at 576-577. Division of the benefits, the Court concluded, would "deprive [the worker] of a portion of the benefit Congress * * * indicated was designed for him alone." *Id.* at 583.

In *McCarty* v. *McCarty*, 453 U.S. 210 (1981), the Court concluded that community property law could not be applied to military retirement pay; it stressed that Congress had made retirement pay a personal entitlement of the retired officer, a conclusion reinforced by the fact that retirement pay could not be attached or assigned, subject to a limited exception

for alimony and child support. *Id.* at 228-230.[18] Similarly, in *Ridgway* v. *Ridgway*, 454 U.S. 46 (1981), the Court found that a constructive trust on the proceeds of a servicemember's life insurance policy, imposed by a state divorce court to satisfy property settlement obligations under a divorce decree, conflicted with the relevant statute's anti-attachment provision, which was enacted to "ensure[] that the benefits actually reach the beneficiary." *Id.* at 60-61 (quoting *Hisquierdo*). And most recently, in *Mansell* v. *Mansell*, 490 U.S. 581 (1989), the Court similarly concluded that California community property law could not be applied, in a divorce proceeding, to military retirement pay that was waived by the retiree in order to receive disability benefits.

While the provisions under review in those cases differed from each other and from those in ERISA in certain respects, the Court found particularly significant, in each case, that Congress had either required or permitted the designation of a specific beneficiary, that Congress had protected the benefits from alienation or attachment, or both. Statutory designated-beneficiary provisions demonstrate that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Wissner*, 338 U.S. at 658; see *Ridgway*, 454 U.S. at 52 (federal statute "establishe[d] a specified 'order of precedence' "). Anti-alienation clauses protect that congressional policy from disruption by

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[18] In *McCarty*, the Court specifically noted, with disapproval, the fact that "at least one court (in a noncommunity property State) has gone so far as to hold that the heirs of the ex-spouse may even inherit her interest in military retired pay." 453 U.S. at 233.

state law that would operate to secure an interest in other persons in the assets or proceeds subject to federal law. See *Ridgway*, 454 U.S. at 60; *Hisquierdo*, 439 U.S. at 583-584, 588; *Wissner*, 338 U.S. at 658-659; *Free*, 369 U.S. at 669.[19]

In this case, Congress has similarly spoken with "force and clarity," by providing that surviving spouses and living ex-spouses shall have an interest in a participant's pension plan benefits (29 U.S.C. 1055(a), 1056(d)(3)), and by protecting the payment of benefits to participants, designated beneficiaries, and statutory beneficiaries through an anti-alienation provision (29 U.S.C. 1056(d)((1)). Enforcement of respondents' state-law rights to inherit their mother's asserted community property interest in the pension plan benefits cannot be reconciled with those considered policy choices by Congress. Accordingly, ERISA preempts the application of state community property law to benefits of an ERISA-covered pension plan.[20]

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[19] The only recent case pointing in the opposite direction is *Rose* v. *Rose*, 481 U.S. 619 (1987). In that case, the Court held that a state court had jurisdiction to hold a disabled veteran in contempt for failing to pay child support out of his veteran's disability benefits. The Court's holding rested crucially on its conclusion that Congress had intended veteran's benefits to be available for the support of veterans' families, as well as the veterans themselves. *Id.* at 630-631, 634. In ERISA, similar protection for support for dependent family members is found in the carefully tailored QDRO provisions added by the REA, which, as we have explained, do not apply to this case. See note 9, *supra*.

[20] We agree with petitioner (Pet. Br. i, 24-26) that the preemption of Louisiana community property law under 29 U.S.C. 1144 applies equally to the funds that Mr. Boggs rolled over into an IRA. As we have explained above, any state-law claim to the funds in the savings plan that respondents may have inherited from their mother is superseded by ERISA. Those funds were still in the ERISA-covered savings plan when Dorothy Boggs died, and were rolled over into the IRA only later, after Isaac Boggs retired. The community property regime between Isaac and Dorothy Boggs terminated upon Dorothy's death, see La. Civ. Code Ann. art. 2356 (West Supp. 1996), and so neither Dorothy Boggs nor her devisees could have acquired a community property interest in the IRA after Dorothy Boggs' death. Nothing in 26 U.S.C. 408 suggests that a community property interest could nevertheless spring into being, notwithstanding the absence of any such interest when the funds were in the ERISA plan itself, merely because Mr. Boggs placed his Savings Plan funds into an IRA account. We do not understand petitioner to be arguing that, if 29 U.S.C. 1144 does not preempt the application of Louisiana community property law in this setting, such that respondents could have claimed an interest through their mother to a share in the funds when they were in the Savings Plan, 26 U.S.C. 408 would intervene as an independent basis for preemption, once the funds were placed in the IRA.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 96-79

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SAUNDRA JEAN DALE BOGGS,
Petitioner,

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID M. BOGGS,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

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No. 96-79

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On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a nonprofit membership organization of more than 33 million persons age 50 or older that is dedicated to addressing the needs and interests of older Americans. AARP seeks through education, advocacy and service to enhance the quality of life for all by promoting independence, dignity and purpose. As a method of promoting independence, AARP attempts to foster the economic security of individuals as they age by seeking to increase the availability, security, equity, and adequacy of private and public pension plans. In 1993, AARP established its Pension Equity Project to advocate for security and equity in retirement benefits and to educate the public about the need for greater safeguards in the pension system. AARP's Women's Initiative advocates for the

economic, social, health and long-term care needs of midlife and older women. In particular, AARP's Women's Initiative works to strengthen the pension system to achieve pension equity for women as workers and spouses.

AARP is qualified to brief the Court on the implications of the decision in this case, having participated as *amicus curiae* in numerous cases involving the Employee Retirement Income Security Act ("ERISA") and other employment laws, including *Varity Corp. v. Howe*, 116 S. Ct. 1065 (1996), *John Hancock Mutual Life Insurance Co. v. Harris Trust & Savings Bank*, 510 U.S. 86 (1993), and *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

AARP's members and other older Americans depend on ERISA to protect their rights under private employer-sponsored employee benefit plans. 29 U.S.C. § 1001 *et seq.* Thus, ERISA's protections, and the ability to enforce those protections, are of vital concern to older workers and retirees, since the quality of their lives in retirement depends heavily upon the security and amount of their pension benefits.[1/]

However, economic security for older women is elusive because so few women receive any pension income to supplement their Social Security benefits.[2/] Only 38% of

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[1/] Private pensions comprise between one-quarter and one-third of total retirement income, depending on marital status, for those individuals receiving such benefits. The Congressional Budget Office has estimated that pension benefits will comprise approximately 30% of total income for retirees in the year 2019. WOMEN'S PENSIONS: RECENT LEGISLATION GENERALLY IMPROVED PENSION ENTITLEMENT AND INCREASED BENEFITS 1-2 (GAO/HRD-92-20, Mar. 1992) (Testimony of Jane L. Ross, Associate Director, Income Security Issues, Human Resources Division, Before the Subcommittee on Retirement Income and Employment, H. R. Select Comm. on Aging) [hereinafter "WOMEN'S PENSIONS"].

[2/] Three-fourths of the nation's 3.3 million elderly poor are women. Women 65 and older are more than twice as likely as older men to be poor (continued...)

retired women 55 and older received pension income in 1994, compared to 57% of men. Even when women do collect a pension, they collect only about half as much as their male counterparts and are more likely to receive their benefits as lump sums rather than as annuities. U.S. Department of Labor, Pension and Welfare Benefits Administration, RETIREMENT BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE SEPTEMBER 1994 CURRENT POPULATION SURVEY at 3-5 (1995). Accordingly, women are heavily reliant on the pensions they receive as spouses of workers.[3/]

The provisions added by the Retirement Equity Act of 1984 (REA)[4/] to ERISA are key to protecting spousal pension rights. S. REP. NO. 98-575, 98th Cong., 2d Sess. 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS 2547, 2558. If ERISA does not preempt state community property laws, like Louisiana's, which effect ERISA-governed employee benefit plans, then Congress' intent to protect spousal pension rights will be frustrated.

This case, along with the two other cases upon which this Court has granted *certiorari*,[5/] presents the Court with the

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[2/] (...continued)
and near-poor. U.S. Bureau of the Census, CURRENT POPULATION REPORTS, SERIES P60-194, *Poverty in the United States: 1995*, Table 2, at 2 (Sept. 1996).

[3/] Women's Pensions, *supra*, at 9, 10.

[4/] Pub. L. No. 98-397, 98 Stat. 1426 (1984).

[5/] *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A, Inc.*, 57 F.3d 712 (9th Cir. 1995), *cert. granted*, 116 S. Ct. 1415 (U.S., Apr. 15, 1996) (No. 95-789) (whether ERISA preempts state prevailing wage laws); *DeBuono v. NYSA-ILA Medical and Clinical Services Fund*, 74 F.3d 28 (2d Cir.), *cert. granted*, 117 S. Ct. 292 (U.S., Oct. 15, 1996) (No. 95-1594) (whether ERISA preempts a (continued...)

opportunity to clarify the scope of ERISA's preemption's clause. The decision in these cases will have a direct and vital bearing on the economic security of AARP's members and other older Americans. In light of the significance of the issues presented by this case, AARP respectfully submits this brief *amicus curiae*.[6/]

SUMMARY OF ARGUMENT

ERISA preemption analysis is no different from any other preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99. Any state law that directly conflicts with a federal law, either on its face or in application, must be preempted because it would frustrate Congress' purpose in enacting the federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, state laws that conflict with the substantive provisions of ERISA by regulating how benefits are to be paid and by creating specific requirements concerning distribution of benefits must be preempted.[7/] *E.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Congress enacted ERISA's preemption clause to avoid multiplicity of regulation in order to promote the uniform administration of employee benefit plans. *New York State*

[5/] (...continued)
state law taxing an employee benefit plan acting as a health care provider).

[6/] The written consent of each party has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[7/] This case concerns the limited issue of whether, in a context other than divorce, state courts may apply state community property laws to ERISA-governed plans.

Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co. ("Travelers"), 115 S. Ct. 1671, 1677-78 (1995). Through provisions in ERISA and REA, Congress established a detailed procedure for receipt and distribution of benefits in order to improve spousal pension protections. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558. Although studies indicate that REA has been effective in increasing the number of surviving spouses receiving survivor's benefits, PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW (GAO/HRD-92-49, Feb. 1992), Congress recently enacted additional legislation to improve spousal pension protections, evidencing its intent to continue to dominate in this field. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, §.1457, 110 Stat. 1755, 1818-19 (August 20, 1996).

Enforcement of state community property laws, such as Louisiana's, will undercut the detailed procedure for receipt and distribution of benefits that Congress established through ERISA and REA. Moreover, enforcement of these laws will frustrate Congress' purpose of preventing employee benefit plans from having to comply with different laws in all 50 states. Consequently, ERISA must preempt Louisiana's community property law.

ARGUMENT

I. A STATE LAW THAT DIRECTLY CONFLICTS WITH ERISA MUST BE PREEMPTED BECAUSE IT FRUSTRATES CONGRESS' INTENT TO AVOID A MULTIPLICITY OF REGULATION.

ERISA preemption analysis must follow traditional preemption analysis. *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. at 99 ("we discern no solid basis for believing that, Congress, when it designed ERISA, intended fundamentally to alter traditional preemption analysis"). Accordingly, "'the purpose of Congress is the

ultimate touchstone of preemption analysis.'" *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (*quoting Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978) (*quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963))); *see* U.S. CONST. art. VI, cl. 2. Under traditional preemption analysis, any state law that directly conflicts with a federal law, either on its face or in application, must be preempted because it would frustrate Congress' purpose in enacting the federal law. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230.

"To discern Congress' intent we examine the explicit statutory language and the structure and purpose of the statute." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990). Congress' intent concerning ERISA's preemptive effect is explicitly stated in the statutory language of ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) states that ERISA "shall supersede any and all State laws insofar as they. . . relate to any employee benefit plan" covered by the statute. In interpreting the phrase "relate[s] to" in *Travelers*, 115 S. Ct. 1671 (1995), this Court reiterated the necessity of determining Congress' purpose in enacting ERISA's preemption clause. This Court concluded that "the basic thrust of the pre-emption clause, then, was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 1677-78. State laws that conflict with the substantive provisions of ERISA obviously "relate to an employee benefit plan," and must be preempted. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 739. Otherwise, these laws would frustrate Congress' intent to foster uniform administration of employee benefit plans. *Travelers*, 115 S. Ct. at 1677-78.

Accordingly, state laws are preempted if they (1) regulate the types of benefits or terms of a plan, *e.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992) (workers' compensation law prohibiting termination of health benefits of workers receiving workers' compensation benefits is preempted); (2) create specific requirements as to funding, reporting and disclosure, vesting,

and the like, *e.g., Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978) (state law regulating funding and disclosure requirements of ERISA plans is preempted); and (3) establish rules for the calculation of benefits, *e.g., FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (interference with calculation of benefits through state antisubrogation statute); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (prohibition of offset of workers' compensation benefits against retirement benefits). *See generally Airparts Company, Inc. v. Custom Benefit Services of Austin*, 28 F.3d 1062, 1064-65 (10th Cir. 1994); *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 553 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990). These laws directly regulate ERISA plans and conflict with ERISA; hence they must be preempted. *Cf. Travelers*, 115 S. Ct. at 1683 (recognizing that laws having direct effects on plans are preempted).

II. CONGRESS ENACTED THE RETIREMENT EQUITY ACT TO IMPROVE SPOUSAL PENSION PROTECTIONS.

A. ERISA Provides Uniform Standards Concerning The Form, Payment and Distribution Of Spousal Benefits.

"ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). "The statute imposes participation, funding, and vesting requirements on pension plans." *Id.* at 91. ERISA also provides uniform minimum standards for the form, payment and distribution of benefits. Part 2 of ERISA, 29 U.S.C. §§ 201-211. *See generally* Karen C. Holden, *The Income Shock of Widowhood: Public Policy Issues*, Vol. 6, No. 2 THE LAFOLLETTE POLICY REPORT at 11 (Fall 1994); D. McGill and D. Grubbs, Jr., FUNDAMENTALS OF PRIVATE PENSIONS, Chapters 4 - 6 (6th ed. 1989). Through ERISA § 205, Congress mandated a particular benefit structure.

ERISA § 205 requires that a plan that offers benefits in the form of a life annuity -- benefit payments where the continuation of benefits depends on someone's survival -- must offer these benefits in the form of a "qualified joint and survivor annuity." 26 C.F.R. §§ 1.401(a)-11(a)(1) & (b)(1). A qualified joint and survivor annuity "provides benefits during the joint lives of a participant and the participant's spouse, and after the death of the participant (**assuming the spouse is still alive**) provides survivor's benefits of not less than 50 percent, nor more than 100 percent, of the benefits payable during the joint lives of the couple." S. Bruce, PENSION CLAIMS: RIGHTS AND OBLIGATIONS, *Survivor's Benefits* at 260 (2d ed. 1993) (citations omitted) (emphasis added). Benefits are paid to the surviving spouse only if he or she survives the participant.

Prior to the enactment of REA, however, participants could, whether intentionally or unknowingly, sign away their spouse's rights to receive a pension after they died. The spouse did not even have to be informed, let alone give consent to the waiver of survivor benefits. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558. As a result, many surviving spouses, almost exclusively older women, were left without survivor's pension benefits, placing them in dire financial straits. *Potential Inequities Affecting Women: Hearings on S. 19 and S. 888 Before the Senate Finance Comm. on S. 19 and S. 888*, 98th Cong., 1st Sess. 102-103, 345-51 (June 20, 1983).

B. Congress Enacted The Retirement Equity Act To Require That Spouses Will Automatically Receive A Surviving Spouse's Annuity Unless They Waive Their Rights To That Benefit.

With the passage of REA in 1984, Congress at least partially addressed the economic vulnerability of elderly widows. Congress anticipated that by bringing the spouse into the decision making process concerning the election of benefit options a greater percentage of men would elect the

joint and survivor annuity and give their spouse the opportunity to receive survivor's benefits. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558; PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 3 (GAO/HRD-92-49, Feb. 1992).

As a result, federal laws were amended in order to provide significant pension protections to spouses in the event of the death of the plan participant.[1] REA, which amended ERISA, created the requirement of "spousal consent" in the selection of the form of an annuity payable upon the participant's retirement. *See* ERISA § 205, 29 U.S.C. § 1055; IRC §§ 401(a)(11) & 417, 26 U.S.C. §§ 401(a)(11) & 417. Whereas ERISA had previously required only that a pension plan offer joint and survivor benefits as an option, REA requires the actual written consent of the participant's spouse in the event that the participant does not select an annuity with survivor benefits. Under this requirement, unless the spouse has consented to the participant's selection of an annuity without survivor's benefits, a pension plan will generally pay such benefits to a spouse in the event the participant predeceases his or her spouse. Thus, the joint and survivor option is the automatic, or default, option because the survivor's benefits may not be waived without the written consent of the spouse. If a plan does not offer the joint and survivor annuity as the default benefit option, it will not qualify for tax exempt status.[2] IRC §§ 401(a)(11) & 501(a).

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[1] Although Congress was concerned primarily with widows, the statute is gender neutral. *Ablamis v. Roper*, 937 F.2d 1450, 1453 n. 3 (9th Cir. 1991).

[2] For tax exempt pension plans, employers' contributions for employees' pension benefits are tax deductible to the employer and are not treated as taxable income to the employee. IRC §§ 162(a)(1), 402(a)(1), & 404(a); Treas. Reg. §§ 1.402(a)-1(a)(1)(i) & 1.404(a)-1b.

Under REA, the spouse must knowingly consent in writing, and the signature must be witnessed by a pension plan representative or a notary public. ERISA § 205(c)(2), 29 U.S.C. §1055(c)(2); IRC § 417(c)(2), 26 U.S.C. § 417(c)(2). REA describes what information must accompany the consent to the waiver of a joint and survivor annuity. The requirement seeks to ensure that spouses will receive information about the effect of choosing a life annuity -- the option to receive higher pension benefits during the retiree's lifetime with no chance of receiving survivor benefits. If the spouse fails to consent (except in limited situations, *see* IRC § 417(c)(2)(B)), the participant loses the right to select the single life option. *See generally* D. McGill and D. Grubbs, Jr., FUNDAMENTALS OF PRIVATE PENSIONS, *Retirement Benefits* at 138-43 (6th ed. 1989).

A spouse's consent to any election of benefits is effective only for that spouse so that spousal consent must be obtained after each remarriage. S. REP. NO. 98-575 at 14, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2560. For example, if a participant has designated a child of the first marriage as a beneficiary with the first spouse's consent, a second marriage overrides that designation and requires the second spouse's consent for the child's interest to continue. *Id.*

Under ERISA, death extinguishes the spouse's rights. Thus, if the spouse dies before the participant, the spouse has no rights to, or in, the participant's pension benefits. They cannot be bequeathed.

C. Congress Achieved Its Purpose In Enacting The Retirement Equity Act Because More Surviving Spouses Are Receiving Survivor's Benefits.

After the passage of REA, Congress commissioned a number of studies from the Government Accounting Office to determine the effect of federal pension legislation on women and whether Congress was successful in achieving its purpose. Pub. L. No. 98-397, § 304, 98 Stat. 1454 (1984);

IRS EFFORTS UNDERWAY TO IMPROVE SPOUSAL CONSENT FORMS (GAO/HRD-92-31, Dec. 1991); PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW (GAO/HRD-92-49, Feb. 1992); PRIVATE PENSIONS: 1986 LAW WILL IMPROVE BENEFIT EQUITY IN MANY SMALL EMPLOYERS' PLANS (GAO/HRD-91-58, MAR. 1991); PRIVATE PENSIONS: IMPACT ON NEW VESTING RULES SIMILAR FOR WOMEN AND MEN (GAO/HRD-90-101, AUG. 1990); PRIVATE PENSIONS: SPOUSAL CONSENT FORMS HARD TO READ AND LACK IMPORTANT INFORMATION (GAO/HRD-90-20, Dec. 1989).

The study on survivor benefit coverage indicates that REA has been effective in increasing the number of surviving spouses who receive survivor's benefits. After the passage of REA, survivor benefit coverage for wives of private pension retirees increased by 15%. Thus, for many widows, survivor benefits from their husbands' pension plan constitute a significant part of the retirement income received from employment-based sources. PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 1-2, 6 (GAO/HRD-92-49, Feb. 1992).

A more recent study confirmed that the percentage of recipients selecting a joint and survivor option has steadily increased every year since the enactment of REA. In 1993-94, a joint and survivor option was selected by 62% of men and 28% of women who were eligible to receive pension benefits, resulting in 59% of married pensioners receiving a benefit with a joint and survivor option. The percentage selecting a joint and survivor option increased for more recent recipients: only 38% of recipients receiving benefits prior to 1975 chose the joint and survivor annuity compared with 62% of those retiring in 1993 or 1994. U.S. Department of Labor, Pension and Welfare Benefits Administration, RETIREMENT BENEFITS OF AMERICAN WORKERS: NEW FINDINGS FROM THE SEPTEMBER 1994 CURRENT POPULATION SURVEY at 5, 24, Table D.10 at 101-02 (1995).

In recent legislation, Congress reiterated that rules relating to spousal consent "serve important purposes in

protecting spousal rights to retirement plan benefits", but also recognized that the rules are extremely complicated.[10/] H.R. CONF. REP. NO. 3445, 104th Cong. 2d Sess. (1996). In order to assist spouses to understand and comply with these rules, Congress is requiring the Internal Revenue Service to develop sample language for spousal consent forms as well as publicity for the sample language in pension outreach efforts. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1457, 110 Stat. 1755, 1818-19 (August 20, 1996). By making the spousal consent forms easier to understand, Congress hopes that fewer spouses will waive their survivor's benefits without understanding what they have relinquished. Through this legislation, Congress reaffirmed its intent to further improve spousal pension protections.

III. LOUISIANA'S COMMUNITY PROPERTY LAW MUST BE PREEMPTED BY ERISA BECAUSE IT CONFLICTS WITH CONGRESS' INTENT TO PROMOTE UNIFORM ADMINISTRATION OF EMPLOYEE BENEFIT PLANS AND TO IMPROVE SPOUSAL PENSION PROTECTIONS.

In ERISA, Congress established an extremely detailed procedure in order for participants and beneficiaries to receive pension benefits. Not only must a participant work a certain number of years to be vested, but even after the participant is vested, Congress decreed certain requirements in order for the participant and beneficiaries to receive benefits. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 90-91. Indeed, Congress deemed survivor's pension benefits so important that married participants can only receive a benefit that does not provide for their spouses unless their spouses

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10/ A study on spousal consent forms concluded that participants and beneficiaries found the forms difficult to understand, even though the forms were the main source of information concerning spousal benefits. PRIVATE PENSIONS: SPOUSAL CONSENT FORMS HARD TO READ AND LACK IMPORTANT INFORMATION (GAO/HRD-90-20, Dec. 1989).

provide a written consent to waive their rights, ERISA § 205, 29 U.S.C. § 1055; IRC §§ 401(a)(11) & 417, 26 U.S.C. §§ 401(a)(11) & 417, and pension plans will lose their tax qualification if they do not include these provisions. IRC §§ 401(a)(11) & 501(a). Finally, although studies indicated that REA has been successful in increasing the number of spouses receiving survivor's benefits, PENSION PLANS: SURVIVOR BENEFIT COVERAGE FOR WIVES INCREASED AFTER 1984 PENSION LAW at 1-2, 6 (GAO/HRD-92-49, Feb. 1992), in 1996, Congress enacted legislation to better protect spousal benefits, showing its intent to continue to be involved in this field. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1457, 110 Stat. 1755, 1818-19 (August 20, 1996).

In direct conflict with ERISA's substantive provisions, Louisiana's state community property law also regulates who is entitled to pension benefits, and how and in what form those benefits are to be paid. ERISA, therefore, must preempt Louisiana's community property law. *E.g., District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125 (1992); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. at 739; *Hewlett-Packard Co Hewlett-Packard Co. v. Barnes*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Moreover, if ERISA does not preempt Louisiana's community property law, then that state law will undercut two of Congress' purposes when it enacted ERISA and REA: uniform administration of employee benefit plans, *Travelers*, 115 S. Ct. at 1677-78, and improvement of spousal pension protections. S. REP. NO. 98-575 at 12, *reprinted in* 1984 U.S. CODE CONG. AND AD. NEWS at 2558.

If the state law is not preempted, state community property laws would determine the beneficiaries of a participant's pension, instead of ERISA's uniform provisions. Pension plans would be required to comply with conflicting directives among 50 states, thereby increasing the administrative and financial burdens pension plans face. Compliance with different laws in 50 states would also make

administration of nationwide benefit plans more difficult and inefficient, which might lead sponsoring employers with benefit plans to reduce benefits or those employers without benefit plans to refrain from offering them. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10-12 (1987). Moreover, there would be no finality concerning payment of pension benefits. Instead, pension plans would become embroiled in state probate actions, also increasing their administrative costs. As a way to minimize their liability, pension plans might file interpleader actions to request court determinations concerning to whom payment shall be made. *E.g., Stickney v. Muhlenberg College TIAA-CREF Retirement Plan*, 896 F. Supp. 412 (E.D. Pa. 1995). A conclusion by this Court that ERISA does not preempt state community property laws would run counter to Congress' intent "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Travelers*, 115 S. Ct. at 1677-78.

Finally, ERISA's spousal benefit rules, and ERISA's requirement that plans adopt these rules, are critical to determining whether a surviving spouse has a right to a benefit under a pension plan. *Cf. Ingersoll-Rand v. McClendon*, 498 U.S. at 139-40 ("[T]he existence of a pension plan is a critical factor in establishing liability under the State's wrongful discharge law. As a result, this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself."). If state community property laws, such as Louisiana's, are not preempted by ERISA, they will completely negate Congress' intent of improving surviving spouse's pension protections.

Accordingly, ERISA must preempt Louisiana's community property law in order to prevent a direct conflict with ERISA's substantive provisions and accomplish Congress' intent to promote uniform administration of employee benefit plans and improve surviving spouse's pension protections.

CONCLUSION

For the foregoing reasons, AARP urges the Court to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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No. 96-79

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS,
Petitioner,
v.
THOMAS F. BOGGS, HARRY M. BOGGS,
AND DAVID B. BOGGS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF OF THE EMPLOYERS COUNCIL ON FLEXIBLE COMPENSATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

The Employers Council on Flexible Compensation ("ECFC") submits this brief *amicus curiae* supporting Petitioner.

The parties have consented to the filing of this brief. Correspondence reflecting the parties' consent has been lodged with the Clerk.

INTEREST OF THE AMICUS CURIAE

ECFC is a non-profit membership association committed to the study and promotion of 401(k) plans,[1] cafeteria

[1] Plans authorized by section 401(k) of the Internal Revenue Code. Such plans are tax-qualified and are pension plans of the defined contribution type under ERISA.

plans and other employee benefit plans. The more than 2,800 members of ECFC are plan sponsors, corporations, governments, unions, universities, hospitals and clinics and actuarial, insurance and accounting firms that design, sponsor and administer plans.

Should the Court uphold the decision of the court below in this case, pension plans will be subject to a burdensome and conflicting patchwork of state and federal law. ECFC's members have a profound and immediate interest in the outcome of this case and its effect on their ability to sponsor and administer pension plans.

SUMMARY OF ARGUMENT

The Court should reverse the court of appeal's decision below.

This case is different from the other preemption cases decided by the Court under ERISA.[2] This case involves the narrow question of marital property preemption which Congress has already addressed in a "comprehensive and reticulated statute,"[3] namely ERISA's provisions creating and protecting the property interests of spouses in the event of divorce or death of a pension plan participant.[4]

This case does not involve metaphysical speculations about what it means for a state law to "relate to" a pension plan. Nor have we here an effect which is tenuous, remote or peripheral. As we will demonstrate below, the *Boggs* decision interferes with core ERISA rights.[5] *Boggs* further subjects plan administration to the very burdens and conflicts ERISA was enacted to eliminate.[6] To demonstrate this, we will describe the practical effects of this case on plan administrators.[7]

[2] Employee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. § 1001 *et seq.*

[3] See *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361; *reh'g denied*, 448 U.S. 908 (1980).

[4] See Part II below.

[5] See Part III below.

[6] See Part IV below.

ERISA's provisions for the protection of spousal interests in a pension plan represent a carefully designed balance between family property interests and the uniform federal scheme created by ERISA. The Court should hold that marital property rights to ERISA pensions under state law are preempted, unless the rights are enforced within the special framework created for those rights by ERISA. As the state rights at issue in this case are not asserted within that ERISA framework, we respectfully urge that the Court reverse the decision of the court of appeals.

ARGUMENT

I. *BOGGS* IS NOT DISTINGUISHABLE FROM *ABLAMIS*.

Presumably one of the motivations for reviewing this case is the conflict between the Fifth Circuit's reasoning below and the Ninth Circuit's reasoning in *Ablamis v. Roper*.[8] The *Boggs* decision held that state marital property laws as applied to ERISA-covered pensions was not preempted, while *Ablamis* held that it was.

The two cases are at first glance distinguishable in that *Boggs* deals with benefits which have already been paid out of a pension plan, while *Ablamis* deals with benefits not yet paid. We nonetheless urge the Court not to distinguish the cases on that basis. We respectfully urge the Court to apply the reasoning of *Ablamis* to the facts in *Boggs*, and hold that ERISA preempts state marital property claims whether addressed to the plan or to the plan beneficiary after payout.

A. State Courts Are Not Likely to Limit *Boggs* to Its Facts.

While the Fifth Circuit based its decision in part on the idea that the plan in the *Boggs* case would be unaffected,

[7] See Part IV below.

[8] 937 F.2d 1450 (9th Cir. 1991).

we believe other courts would soon conclude that this aspect of the decision was not a crucial one. They would find that, to make their orders effective, they would have to direct them to the plans themselves, reaching the money before it is paid out.

The reason for this is obvious from *Stone v. Stone*.[9] In that case, the plan participant was divorced and his wife obtained a court order directing that a portion of his pension be paid to her. The participant retired and left the country, leaving no assets in the United States and refusing to turn over to his former spouse the benefits she was entitled to by court order. If the court had not applied its order to the plan itself, the wife would have been unable to enforce her marital property rights.

Partly in response to *Stone v. Stone*, Congress amended ERISA to give state courts the opportunity to divide ERISA pensions, but within a unifying framework set forth in ERISA.[10] We believe that if state courts are given the authority to divide ERISA pensions outside of this framework, they are bound to conclude that they have the power to make their orders effective. As *Stone v. Stone* shows, this will inevitably lead to levying on plans directly. In fact, it was precisely this reasoning that led the court in *Baker v. Baker*[11] to require a plan to pay a pension *twice*—with interest.

The *Baker* opinion contains other hints as to why state courts would have to extend *Boggs* to orders against the plans themselves: participants might be judgment proof for any number of reasons; the participant might take a complete distribution and abscond with the money; or a participant might make investment elections or distribution form elections that would effectively diminish the

[9] 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

[10] Legislative history of the Retirement Equity Act (REA) is quoted fully on this point at page 9.

[11] 251 Cal. Rptr. 126 (1st Dist. 1988).

value of benefits reachable by his or her spouse. The courts will not feel they are helpless to prevent such obvious machinations.

Thus, to uphold *Boggs*, even with a narrow holding applicable only to payments outside of the plan, would in the long run fail to relieve plans of the costs and burdens of coping with a marital property scheme unchecked by ERISA restraints. And it would not solve the other, more important part of the problem, which is assuring our employees that the pensions needed to live on during retirement will be there as promised for both themselves and their spouses.

B. The Theory Underlying the *Boggs* Holding Does Not Support a Distinction.

Because of the distinction in the facts of the two cases (benefits paid versus benefits payable), the differing outcomes between *Boggs* and *Ablamis* may appear to have a superficial resemblance to the outcomes of certain cases involving ERISA preemption of state garnishment laws. These cases have held that, while ERISA preempts state garnishment actions applied to assets within a pension plan, preemption no longer protects the assets once they have been distributed to the participant.[12]

This resemblance is superficial only, and should not serve as the basis for distinguishing *Boggs* from *Ablamis*. In the garnishment cases, creditors' claims applied generally to all of a debtor's assets. That some of those assets had happened at one time to be in an ERISA plan did not save them from creditors' more general claims. In *Boggs*, by contrast, respondents have no general rights to Petitioner's assets. Their claim to the portion of her assets at issue in this case has no purported foundation apart

[12] See, e.g., *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), *appeal after remand*, *remanded* 10 F.3d 700 (10th Cir. 1993), *modified on reh'g and remanded on other grounds*, 39 F.3d 1078 (10th Cir. 1994), *cert. denied*, 115 S.Ct. 1691 (1995).

from the fact that those assets at one time were in an ERISA plan.

For these reasons, we believe that a distinction between *Boggs* and *Ablamis* is supported neither by its practical consequences nor by any parallels with the garnishment cases.

II. CONGRESS HAS ALREADY DECIDED THIS CASE.

We recognize that the Court may be reluctant to permit federal interference with a time-honored subject of state law, but this is clearly what Congress intended to do.

A. Congress Amended ERISA to Provide a Comprehensive Scheme of Spousal Rights in Participants' Pensions.

Congress struck a balance between the competing considerations involved in this case in 1984 by enacting the Retirement Equity Act ("REA").[13] Amendments to ERISA ensure spousal rights in an employee's pension —property rights that would survive divorce or the death of the employee. Congress at the same time modified the income tax rules applicable to pension plans and individuals, to be consistent with the creation of these spousal rights. By amending ERISA to clarify spousal interests in a pension, Congress achieved a balance between the expectations of participant's spouses to an adequate retirement income in old age, and the interests of pension plans in national uniformity and the avoidance of conflicting regulatory schemes and excessive administrative costs.[14]

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[13] P.L. 98-397, 98 Stat. 1436 *et seq.*

[14] One of the fundamental purposes of ERISA repeatedly emphasized by this Court's decisions is the goal of achieving national uniformity for employee benefit plans and avoiding conflicting state directives. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987), *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

REA's provisions for protection of domestic property rights in a pension involved two parts: mandatory survivor benefits for a spouse following the death of the pension participant, and provisions for the protection of spouses (and minor children) in the event of a divorce.

B. ERISA Mandates Survivor Benefits for a Spouse After a Participant's Death.

To protect surviving spouses who might have been dependent on the earnings or pension of a spouse employed outside the home, REA provided mandatory survivor benefits.[15] In simple terms, these provisions require payment of a pension after the death of a married pension plan participant to the surviving spouse for the spouse's lifetime. Generally, payments under the survivor pension must equal at least 50% of those made during the participant's lifetime. Such provisions had been optional under prior law.[16] By making them mandatory, Congress gave spouses in separate property jurisdictions enforceable rights to their spouses' pensions.

We want to stress the magnitude of the property transfer Congress wrought by vesting in spouses an absolute right to a benefit after the death of a pension plan participant. In separate property jurisdictions, REA divested participants of previous rights they may have enjoyed under the plan to control the survivor benefits under their own pension—for example, to designate their children as sole beneficiaries, or to take their entire pension as a life interest, with no survivor benefits. After REA, the participant may exercise these rights only with the consent of his or her spouse. Legislative history shows that Congress thought this transfer of property interests was

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[15] I.R.C. §§ 401(a)(11), 417 and ERISA § 205, 29 U.S.C. § 1055.

[16] I.R.C. § 401(a)(11) (1983), ERISA § 205 (1983), 29 U.S.C. § 1055 (1983).

appropriate to protect a surviving spouse's expectations in pension income after the death of the participant.[17]

After REA, a spouse's rights to survivor benefits under an ERISA pension plan are governed exclusively by federal law—whether or not the right arises in a community property jurisdiction. Spouses in separate property jurisdictions now have rights similar to those previously enjoyed only by spouses in community property jurisdictions. At the same time, REA replaced the rights of spouses in community property jurisdictions with rights under uniform federal law. For example, typical community property statutes give a spouse a claim only on those assets accumulated during marriage. By contrast, the spouse's claim to a survivor benefit under ERISA is based on the deceased participant's entire pension—including the pension accrued before marriage.[18] The spouse's REA survivor rights trump any other rights or provisions of a pre-nuptial agreement.[19]

C. For Spouses Who Claim Rights Other Than Survivor Benefits, ERISA Creates a Uniform Means of Enforcing Those Rights.

REA also provided for protection of rights under state domestic relations laws within a uniform federal scheme. In several related provisions, Congress created "qualified

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[17] S. Rep. No. 575, 98th Cong., 2d Sess. 12 (Aug. 5, 1984). "The Committee believes that present law results in inequitable treatment of participants in pension plans who die before reaching the normal retirement age under the employer's plan . . . in addition, because the Committee believes that a spouse should be involved in making choices with respect to retirement income on which the spouse may also rely, the bill requires spousal consent when a participant elects not to take a survivor benefit."

[18] I.R.C. §§ 417(b); 417(c). ERISA § 205(d); ERISA § 205(e)(1), 29 U.S.C. §§ 1055(d); 1055(e)(1).

[19] Treas. Reg. § 1.401(a)-20, Q&A-28 (prenuptial agreement cannot waive spouse's REA survivor rights); *see, e.g., Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992), *cert. denied*, 508 U.S. 912 (1993).

domestic relation orders" (QDROs).[20] The QDRO provisions provide a set of rules and procedures for enforcing marital property claims against ERISA-covered pension plans. At the same time, Congress amended ERISA's spendthrift and preemption rules. The spendthrift and preemption amendments make clear that QDROs are the exclusive method of enforcing marital property claims against ERISA-covered pension plans. Other methods are preempted.

The amended spendthrift rule is clear that Congress intended to curb both community property and separate property rights against an ERISA plan. Generally, the spendthrift rule prohibits alienation or assignment of an ERISA plan benefit. REA created an exception to the spendthrift rule for certain "domestic relations orders."[21] A "domestic relations order" specifically includes orders "made pursuant to a State domestic relations law (including a community property law)."[22]

REA's legislative history[23] also makes clear that Congress was contemplating community property along with separate property:

> Several cases have arisen in which courts have been required to determine whether the ERISA preemption and spendthrift provisions apply to family support obligations (*e.g.*, alimony, separate maintenance, and child support obligations). In some of these cases, the courts have held that ERISA was not intended to preempt State domestic relations law permitting the attachment of vested benefits for the purpose of meet-

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[20] I.R.C. §§ 401(a)(13) (spendthrift), 414(p) (QDROs), ERISA §§ 206(d) (spendthrift and QDROs), 514(b)(7) (preemption), 29 U.S.C. §§ 1056(d), 1144(b)(7).

[21] I.R.C. § 401(a)(13)(B), ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A) (similar).

[22] I.R.C. § 414(p)(1)(B)(ii), ERISA § 206(d)(3)(B)(ii)(II), 29 U.S.C. § 1056(d)(3)(B)(ii)(II).

[23] S. Rep. No. 98-575, 98th Cong., 2d Sess. 18-19 (Aug. 5, 1984).

ing these obligations.[22] Some courts have held that the ERISA preemption provision does not prevent application of State law permitting attachment of nonvested benefits for the purpose of meeting family support obligations.[23] There is a divergence of opinion among the courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension plan, etc.[24]

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[22] *See, e.g., American Telephone and Telegraph Co. v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979).

[23] *See, e.g., Weir v. Weir*, 41[3] A.2d 638 (1980); *Kikkert v. Kikkert*, 427 A.2d 76 (1981).

[24] In *Stone v. Stone*, 63[2] F.2d 740 (9th Cir. 1980), the Court held that ERISA was not intended to preempt community property laws and that a court order requiring a division of retirement benefits did not violate the anti-assignment provisions. In *Francis v. United Technolog[ies] Corp.*, 458 F. Supp. 84 (N.D. Cal. 1978), however, the Court held that ERISA's preemption provision prevents the application of State community property law permitting attachment of plan benefits for family support purposes.

While clarifying that ERISA's spendthrift rule preempts state domestic relations laws generally (including community property laws), Congress carved out an exception for state laws enforced through QDROs. As defined by REA, QDROs are court orders that enforce state domestic relations laws, and that meet certain substantive and procedural requirements. These requirements ensure that the rights of all potential claimants to ERISA pension assets are protected:

- A QDRO cannot require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan.
- A QDRO cannot require a plan to provide increased benefits (determined on the basis of actuarial value).

- A QDRO cannot require the payment of benefits to one alternate payee which are required to be paid to another alternate payee under another QDRO.
- A QDRO cannot require a plan to pay benefits to an alternate payee before the earliest retirement age under the plan.

In *Boggs*, the Fifth Circuit recognizes marital property orders outside of a QDRO. This in essence accords the order QDRO treatment without any of the QDRO restrictions, which is to say, without protection for any of the other interests Congress tried to safeguard.

In REA, Congress also modified several other provisions of ERISA (and the Internal Revenue Code) to further define the rights of QDRO claimants. These provisions were not modified for takers under non-QDRO orders—because Congress contemplated that no such takers could exist.

For example, ERISA creates rights only for "participants" (the worker who earns the pension), and "beneficiaries."[24] In REA, Congress specifically made QDRO claimants "beneficiaries" under ERISA, entitling them to ERISA's fiduciary protections.[25] Congress enacted no such provision for non-QDRO claimants.

REA also changed federal tax laws affecting pension plans. Among other things, these rules place limits on how early money can come out of a plan. REA created special

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[24] ERISA §§ 3(7) (defining participant); 3(8) (defining beneficiary), 403(c) (assets of a plan are held for the exclusive benefit of participants and beneficiaries); 404(a) (fiduciary discharges his duty for the exclusive benefit of participants and beneficiaries), 29 U.S.C. §§ 1002(7), 1002(8), 1103(c), 1104(a).

[25] ERISA §§ 3(8), 206(d)(3)(J), 404(a)(1)(A), 29 U.S.C. §§ 1002(8), 1056(d)(3)(J), 1104(a)(1)(A).

waivers for these rules in the case of QDROs—but not for any other kind of marital property order.[26]

REA also modified the personal income tax. REA provided that in community property states, the participant spouse is taxed on the entire pension distribution. REA simultaneously provided an exception for certain distributions to the non-participant spouse (thus ensuring that the tax falls on the individual who receives the distribution)—but only those enforced under QDROs.[27] No such "rationalizing" exception was provided for non-QDRO claimants.

In the next section, we set forth in more detail the vastly complex practical consequences of recognizing state law claimants who are not QDRO claimants (and thus, as we have stated, not ERISA "participants" or "beneficiaries," nor subject to the federal tax changes enacted by REA). In this section, we have aimed to demonstrate two more limited points. First, Congress knew and fully intended to modify state marital property law.

Second, in creating QDROs, Congress opened the exclusive route for claiming ERISA plan benefits under state marital property law. As this Court stated in *Shaw*, "In deciding whether a federal law preempts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue."[28] The statute here states expressly that domestic relations orders against ERISA plans, including orders based on community property law, are preempted unless they are QDROs.[29] Moreover, the surrounding statutory tax and ERISA scheme does not appear even to contemplate claimants under domestic relations orders other than QDROs.

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[26] I.R.C. § 414(p)(10).

[27] See discussion in Part III.

[28] 463 U.S. at 95.

[29] ERISA §§ 206(d), 514(b)(7), 29 U.S.C. §§ 1056(d), 1144(b)(7).

III. *BOGGS* WOULD PRODUCE SIGNIFICANT CONFLICTS BETWEEN STATE LAWS AND ERISA.

A. *Boggs* Would Allow a Wide Variety of State Law Intrusions on Pension Plans.

The reach of the *Boggs* decision is broader than its facts suggest:

First, nothing in the Fifth Circuit's reasoning would restrict its holding to community property. The decision reaches marital property rights of any sort.

Second, the decision is not confined to the reach of marital property rights today. If marital property rights to ERISA pensions outside of QDROs are not preempted, then state courts and legislatures are free to make such rights ever more flexible and marital property ever more tradeable and pension plans will be forced to deal with each such change.

Third, the decision is not confined to transfers of marital property rights in pensions in instances of death. Whenever such property is transferred, the issues we confront here would arise.

Fourth, it is not confined to court orders. Whenever marital property can be conveyed, there will be a change in ownership of the pension rights.[30]

Fifth, it is not confined to family members. If a spouse conveys his or her interest to charity or even to his or her creditors, the assignee would acquire an enforceable interest under an ERISA-covered plan.

Sixth, for the reasons discussed in Part I of this brief, we believe state courts will inevitably extend *Boggs* to direct levies on pension plans themselves.

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[30] As to the ability of spouses to convey their community property interests while alive and still married, see, *e.g.*, Ian F. G. Baxter, *Marital Property* § 18:1 *et seq.*, 20:1 *et seq.* (1973).

B. These State Law Intrusions Would Conflict With ERISA.

Boggs will permit claimants to collect against ERISA plans by enforcing orders that are not QDROs. This produces a number of conflicts with the ERISA and tax rules which govern these plans:

1. *Boggs* strikes at the heart of ERISA as Congress chose to modify it in REA: the protection of spouses in their expectations of retirement income, even against the disruption of divorce or death of the breadwinning spouse.

REA and its legislative history both show that Congress believed it was protecting a special kind of property interest; namely, the spouse's expectations in retirement income. Congress did not seek to create a more general category of spousal property interests.

A spouse's survivor interests in an ERISA plan benefit are not unfettered. Payment of the survivor benefit is not permitted to begin before the earliest date that the participant could have begun collecting the benefit as a retirement pension.[31] Payments under a QDRO are subject to a similar restriction.[32] That is, even for plan benefits paid out under the spouse's separate right, Congress chose that the benefits not lose their essential character as retirement income.

As we have already noted, REA's survivor benefit provisions created in the spouses of pension participants a property interest that divested other rights the participant might have had in the benefit—for example, the right to

[31] I.R.C. § 417(e)(2)(B), ERISA § 205(e)(1)(B), 29 U.S.C. § 1055(e)(1)(B) (survivor benefits cannot begin before participant would have reached earliest retirement age under the plan).

[32] I.R.C. § 414(p)(4), ERISA § 206(d)(3)(E), 29 U.S.C. § 1056(d)(3)(E) (QDROs cannot be distributed before participant reaches earliest retirement age under the plan).

provide survivor benefits to his or her own children. Legislative history shows that Congress believed it was the spouse's expectations of retirement income that served to trump these other rights against a pension.[33]

2. No one would ever ask a court for a QDRO if *Boggs* is upheld. QDROs contain numerous protections, designed to protect not only the claimant seeking to enforce the order, but all other potential claimants to the assets (we have outlined these above). Marital property laws do not contain those protections. Upholding *Boggs* would essentially repeal the QDRO statute.

3. The claimants under marital property orders or conveyances will not be "participants" or "beneficiaries" within the meaning of ERISA.

An ERISA "participant" is defined as an employee (or former employee) of the employer.[34] An ERISA "beneficiary" includes only two categories of individuals: (1) "a person designated by a participant, or by the terms of an employee benefit plan,"[35] and (2) a payee under a QDRO.[36] But the claimants under non-QDRO orders or conveyances are not participants or beneficiaries under any of these rules.[37]

This produces a serious anomaly. For instance, ERISA plan fiduciaries are required to administer plans for the exclusive benefit of participants and beneficiaries.[38] Fiduciaries have no obligation to look after the interests of non-QDRO claimants. Moreover, they would breach their

[33] S. Rep. No. 575, 98th Cong., 2d Sess. 12 (Aug. 5, 1984).

[34] ERISA § 3(7), 29 U.S.C. § 1002(7).

[35] ERISA § 3(8), 29 U.S.C. § 1002(8).

[36] ERISA § 206(d)(3)(J), 29 U.S.C. § 1056(d)(3)(J).

[37] The point was recognized (with respect to ERISA beneficiary status) in *Baker, supra.*

[38] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A).

fiduciary duties to the ERISA participants and beneficiaries if they devoted any plan resources to protecting those other interests. To require them to act as fiduciaries with respect to non-QDRO claimants would be to read the exclusive benefit requirement out of the statute.

As we discussed in Part I, the state courts are unlikely to conclude that there can be no rights without protections. Instead, if there is no federal protection for non-QDRO claimants, the state courts may move to fill the vacuum by insisting on state protection. They may insist, for instance, that participants be prevented from withdrawing money ultimately due other claimants. They may insist that a participant with investment authority over his or her account not be permitted to make investments that would jeopardize the share due other claimants. If the plan fiduciaries have investment authority, the courts may forbid the fiduciaries themselves from making such jeopardizing investments or hold them liable for damages if they do. These outcomes are not speculative, but, as we discussed in Part I, are based on results of pre-REA case law governing marital rights against pension plans.

These actions would drive a wedge of state authority into the heart of plans protected by ERISA, which was supposed to establish the regulation of employee benefit plans "as exclusively a federal concern." [39] Once allowed in, as state laws evolve, their intrusions are bound to intensify.

4. ERISA pension plans could lose their favorable tax treatment if non-QDROs could be enforced against them. Most ERISA pension plans (and the plans at issue in *Boggs*) are tax qualified plans. This means that they (and their participants) receive favorable tax treatment in return for complying with a set of complex tax rules.[40]

[39] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

[40] ERISA pension plans that are "qualified" under I.R.C. § 401 enjoy three tax benefits: (1) income on the trust is exempt from taxation, I.R.C. § 501(a); (2) the employer gets a current deduction for contributions to the trust, I.R.C. § 404(a); and (3) taxation on participants' vested rights in their pension benefit is deferred until the income is distributed, I.R.C. § 402(a).

Among other things, these rules contain strict requirements governing the earliest time a distribution can be made from a plan. Some of these requirements were waived by REA for distributions made pursuant to QDROs.[41] They were not waived for other distributions. Thus, if non-QDRO marital property orders are not preempted, a court may well order distribution to a non-QDRO claimant at a time when the tax rules do not permit distributions. Any distributions made under these circumstances will cause the plan—and its participants—to lose eligibility for favorable tax treatment under the Internal Revenue Code.

In this instance, we will find ourselves in the position of managing pension plans with diametrically opposed orders from different parts of the government,[42] each threatening the plans with severe penalties for noncompliance.

5. Non-QDRO orders will threaten the tax qualified status of plans in a second way. Another of the Internal Revenue Code's many requirements for favorable tax treatment is that the pension plan be maintained for the exclusive benefit of employees and their "beneficiaries." [43] (We have already discussed a similar rule in ERISA.) The term "beneficiaries" is defined to mean, "the estate of the employee, dependents of the employee, persons who are the natural objects of the employee's bounty, and any person designated by the employee to share in the benefit of the plan after the death of the employee." [44]

[41] I.R.C. § 414(p)(10).

[42] *I.e.*, a state court and the IRS.

[43] I.R.C. § 401(a)(2).

[44] Treas. Reg. § 1.401-1(b)(4).

Non-QDRO claimants may be none of these. Thus, allowing them rights will threaten tax-qualified plans with the enormous penalty of disqualification.[45]

6. Permitting non-QDROs is inconsistent with sound tax policy. We have already observed that, under *Boggs*, if a spouse conveys his or her interest to charity or even his or her creditors, the assignee would acquire an enforceable interest under an ERISA-covered plan. *Boggs* thus permits assignees with no conceivable relationship to the pension plan to enjoy the fruits of the tax-favored status that Congress conferred for the narrow and express purpose of promoting pension retirement security.

7. *Boggs* will also confound the personal income tax treatment of pension distributions. Generally, a married taxpayer in a community property state is taxable on only one-half of his or her income, while the taxpayer's spouse is taxable on the other half.[46] Prior to REA, this same principle applied to distributions from qualified plans, so that husbands and wives in community property states were taxed at the time of distribution only on their respective community property interest.[47]

REA made a fundamental change in the tax law regarding taxation of distributions from qualified plans in community property states. After REA, plan participants bear the full brunt of income taxation for plan distributions, except where there is a QDRO. If a former spouse is the alternate payee under a QDRO, then the alternate payee is taxed on the amount actually received by him or her.[48]

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[45] Rev. Rul. 73-238, 1973-1 C.B. 193; Rev. Rul. 69-493, 1969-2 C.B. 88.

[46] *U.S. v. Mitchell*, 403 U.S. 190 (1971).

[47] *Powell v. Commissioner*, 101 T.C. 489 (1993).

[48] I.R.C. §§ 72(m)(10), 72(t)(2)(C), 402(e)(1), 4980A(c)(2)(B) and (f)(4)(A).

Marital property orders that do not fall within the QDRO rules would not be addressed by these special tax-shifting rules, an issue which the Tax Court has squarely addressed in *Karem v. Commissioner*.[49] *Karem* involved the taxation of a lump sum pension distribution in a community property state. The Court noted that REA's changes to the tax rules shifted the tax on the entire amount back to the participant, except in cases where the spouse received payment under a QDRO. But since court order directing payment to the spouse in *Karem* on community property grounds was not a valid QDRO, the Court held that there was no tax shifting. As a result, the participant was liable for tax on the entire amount even though half went to his wife. 100 T.C. at 531.[50]

In short, Congress' careful scheme to split the taxes between a participant and an alternate payee receiving QDRO benefits would be stymied if non-QDROs orders were permitted. Benefits might be split, but the participant would be stuck with the whole tax bill.

IV. STATE LAW CLAIMS WOULD COMPLICATE AND BURDEN PLAN ADMINISTRATION.

Permitting non-QDRO claimants would also impose an immense administrative burden.

A. Payments of Pensions Would Be Delayed.

Allowing marital property orders or conveyances to reach pensions outside of the QDRO context will further undermine the pension system by causing plan fiduciaries to delay benefit payments until the possibility of rival claims has been settled.

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[49] 100 T.C. 521 (1993).

[50] Although the holding of *Karem* applies only to the taxation of lump sum distributions from qualified plans, the Tax Court notes they would have reached the same answer for non-lump sums as a result of the REA QDRO provisions.

ERISA section 404(a)(1)(D)[51] requires plan fiduciaries to follow the terms of the plan documents. As in the *Boggs* case itself, the typical situation will be one where the plan will direct payment to one individual while marital property rights may direct the payment of plan benefits to another.

ERISA section 404(a)(1)(B)[52] requires plan fiduciaries to act prudently at all times. If marital property claims are confined to the QDRO context, in the typical case the fiduciaries can make payment in accordance with the plan terms until a QDRO comes along. In most cases, a fiduciary need not fear having to pay more than once, because the QDRO rules, as noted above, prevent QDROs from requiring payments of benefits to one alternate payee when a prior order requires those benefits to be paid to another, and prevents a QDRO from directing a plan to pay increased benefits.

No such safeguards would exist if marital property claims outside of the QDRO context could be enforced. A prudent fiduciary would realize there may be multiple claimants to benefits on multiple occasions: a participant's divorce, the participant's death, the death of a former spouse, or even a conveyance by a spouse or former spouse of his or her community property interest in the participant's pension. In order to avoid the possibility of having to pay a pension more than once, a prudent fiduciary would want to hold up payments until either rival claims are settled or there is a determination that there are no rival claims.

B. Elaborate Systems Would Be Necessary to Track Possible Claimants.

We believe that the prospect of holding up pensions would be untenable for most employers. They know too well that their former employees and spouses need the

[51] 29 U.S.C. § 1104(a)(1)(D).

[52] 29 U.S.C. § 1104(a)(1)(B).

money to live on. One option available is to pay without waiting for rival claims to be settled and so take the risk of having to pay more than once.

Another option is to set up an administrative superstructure to try to track the possibility of marital property claims to eliminate the need to either hold up pensions or pay more than once. Such an attempt would be extremely burdensome and would not likely be successful.

First, it would require expertise in the marital property law of every state and the 50-state overlay of choice of law jurisprudence.[53] Second, a plan would have to track the geographical course of each participant's marriage as he or she moves from state to state over the course of a career. Plans would need copies of participants' wills, their spouses' wills and their former spouses' wills. They would have to track probate proceedings for potential claimants. They would have to track conveyances of marital property. They would have to know the whereabouts of the beneficiaries of all those wills and the assignees of those conveyances, whether they were alive or dead, and what their own wills provided. Prudent fiduciaries would want to set up a notification system to all these far-flung claimants and potential claimants to try to get claims raised and settled in relatively short order.

The Pension Benefit Guaranty Corporation[54] is so concerned with the problem of missing participants that it has issued regulations on the subject.[55] The thought that plans would be able to keep track of this much wider net of potential claimants, a group of people who will often have

[53] And, in today's world, every country.

[54] A federal government insurance corporation which guarantees qualified defined benefit pensions. It was created by Title IV of ERISA in 1974. *See Nachman Corp. v. Pension Ben. Guaranty Corp.*, 446 U.S. 359, *reh'g denied*, 448 U.S. 908 (1980).

[55] PBGC Reg. §§ 4050.1 *et seq.*

only remote and contingent interests in staying in touch with the plans, is rather unrealistic.

In any event, these measures would impose an extraordinary and expensive burden. Nor can one simply answer that "This is just a cost of doing business," passed on to the employer and from the employer to its customers. As this Court recognized in *Shaw*, additional costs also lead to reduced benefits.[56]

Nor is the reduction of benefits always indirect. Pension plans come in two different forms. One is "defined benefit," which means that an employee is promised a specified benefit and the burden is then on the employer to fund those benefits. ERISA § 3(35).[57]

Our association is concerned with the other type of plan, the "defined contribution" or "individual account plan." There, the employer makes contributions into separate accounts for each participant without promising that the plan will be able to pay any particular benefit. ERISA § 3(34).[58] The employee gets his or her benefits based on the contributions and the earnings on those contributions, but minus the plan's administrative costs.

The Department of Labor has taken the position in the QDRO context that a plan may not charge a participant's individual account for the often substantial administrative costs of dealing with the participant's court proceedings leading up to a QDRO and then with respect to implementing the QDRO itself.[59] Accordingly, the costs of dealing with a participant's marital property issues even in the relatively circumscribed QDRO context are borne not by that participant but may be borne by every participant

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[56] 463 U.S. at 105, n.25.

[57] 29 U.S.C. § 1002(35).

[58] 29 U.S.C. § 1002(34).

[59] Adv. Op. Dep't Labor 94-32A (1994).

in the plan, reducing the benefits eventually available to pay pension benefits. This benefit reduction would be multiplied many times over if marital property rights outside of QDROs were allowed to reach pensions.

As a final note on this aspect, it should be mentioned that interpleader does not provide a practical solution.

For one thing, interpleader does not solve the most pressing problem: delays in paying pension benefits. Interpleader proceedings can drag on for years.

Second, interpleader proceedings need monitoring even by the stakeholder who claims no interest in the disputed amount. Monitoring means time and expense. The parties and family property courts are often unfamiliar with the intricacies of pension law and frequently seek the pension administrator's help in understanding the benefits available and the conditions surrounding them. In trying to fashion relief, they raise issues which require the pension administrator to seek legal advice. Parties may want the plan to pay interest, effectively trying to redesign a plan's terms.

In other cases, the parties and court may consult the pension administrator hardly at all. But at the end, they will devise an inappropriate court order, such as asking a plan to turn over a portion of participant's account plus earnings in a case where a defined benefit plan is involved so that there are no accounts or "earnings." The administrator must then go back to the court to explain that the order contemplates the wrong kind of plan.

These are the realities of interpleader from our plans' point of view. They require plans to hire lawyers to monitor and review the proceedings and to respond to what the plans may view as inappropriate orders. This is no small expense.

C. Confiicting State Laws Would Force Plan Administrators to Decide Competing Claims.

Plans will also be exposed to conflicting state regulations, one of the things ERISA preemption was expressly designed to prevent.[60] State laws may vary (and could vary further in the future) as to when marital property rights attach to pensions. For one, it might be at the time of benefit accrual, for another, at the time of vesting, for a third, after some contingency, such as a disability triggering a disability pension. If a participant has spouses from two different jurisdictions, they might have equal rights to the same part of a pension as a result. The QDRO statute would prevent a plan from having to pay more than once in such a case, but if non-QDRO claims are permitted, there would be no such protection. Plans could easily face conflicting directives from different courts as to how to parcel out pension benefits.

D. Liquidity Levels Would Be More Difficult to Manage.

Plans need liquidity to pay benefits, but liquid assets generally earn lower returns so that keeping too large a portion of the pension portfolio liquid results in lower investment returns. That translates into higher benefit costs or lower benefits.

Confining marital property orders to QDROs keeps liquidity concerns within bounds, because QDROs cannot force a plan to pay benefits in a form not contemplated by the plan nor earlier than the participant's earliest retirement date. Marital property orders outside of the QDRO confines would not be subject to any such restrictions. This would force plans to maintain liquidity at levels higher than now necessary.

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[60] *E.g., New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671 (1995).

E. Plans Would Require Amendments to Handle New State Law Claims.

Plan fiduciaries are required to follow a plan's terms.[61] In the QDRO context, for instance, a plan cannot informally put a hold on a participant's benefits until resolution of divorce proceedings.[62] If *Boggs* is upheld, every plan in the country will have to be amended, and procedures implemented, to provide how to deal with non-QDRO claims.

F. Exposing Plans to State Law Claims Would Increase Litigation Costs.

ERISA permits a prevailing party to recover attorney's fees.[63] On top of all the other burdens of dealing with non-QDRO claimants, plans will have to fear paying not just benefits, and a court's determination of appropriate interest, but potentially attorney fees as well.

Attorney fees can often greatly exceed the amount of benefits involved because ERISA benefit claims often resemble class actions from the plan's point of view. A particular claimant might be demanding only $10,000, but the claim might involve an issue which arises for many other potential claimants, perhaps involving amounts far in excess of $10,000. If the plan views the claim as putting, say, $10 million at stake for the plan as a whole, it might be rational for it to put $100,000 in defending a claim it believes is unfounded. If it loses, it might have to pay opposing counsel fees far in excess of $10,000.

G. Claims Under Conflicting Laws Would Invite Litigation.

The private pension system has grown so well under ERISA, that for many Americans, their pension is now

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[61] ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D).

[62] *Schoonmaker v. Empolyee Sav. Plan of Amoco Corp.*, 987 F.2d 410 (7th Cir. 1993).

[63] ERISA § 502(g), 29 U.S.C. § 1132(g).

their family's biggest asset, often more valuable than their house.[64] That, combined with the attractive possibility of winning attorney fees from a plan, will attract all sorts of imaginative litigation.

We believe that Congress tried to curtail such activity by preempting marital property claims that did not comply with the QDRO procedures and restrictions, and we urge the Court to so hold.

CONCLUSION

ERISA's provisions for the protection of spouses in the event of divorce or death of a pension plan participant represent a carefully designed balance between family property interests and the uniform federal scheme created by ERISA. The Court should hold that marital property rights to ERISA pensions under state law are preempted unless they are derived from QDROs. For all the foregoing reasons, this Court is respectfully urged to reverse the court of appeals decision.

Respectfully submitted,

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[64] Mr. Boggs received a lump sum of about $150,000 plus a monthly annuity of about $1,777.67. The discounted present value of the pension annuity would depend on life expectancy and interest rate assumptions; assuming a 20-year payout and 6% interest, the annuity and lump sum combined would yield roughly $400,000.

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INTEREST OF AMICUS

The interest of the State of Louisiana as *amicus curiae* is implied by Rules 29(4)(c) and 37(4) of this Court. In this case, petitioner asserts that the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 *et seq.*, has preempted Louisiana's community property laws[1] as applied to monetary value after its distribution from an ERISA-qualified pension plan to a plan beneficiary. By invoking federal statutory preemption under U.S. Const. art. VI, cl. 2 [Supremacy Clause] against "the application of an otherwise valid state enactment," *Hamm v. City of Little Rock*, 379 U.S. 306, 312 (1964) (citing *Hill v. Florida*, 325 U.S. 538 (1945)), petitioner seeks an "as-applied" nullification of state law pursuant to constitutional challenge. *Id. Cf. McCulloch v. Maryland*, 17 U.S. 316 (1819); *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947); *Maryland v. Louisiana*, 451 U.S. 725, 746-747 (1981).

Absent ERISA, Louisiana's community property laws are clearly applicable to the circumstances of this case. *T.L. James & Co., Inc. v. Montgomery*, 332 So.2d 834 (La. 1976) (holding that because civilian private law obligation itself of employer to pay compensation for employee's labor, even before such obligation was actually paid, was owed not to employee alone but to the community (partnership) between employee and spouse and since contributions of employer to retirement and profit-sharing plans were forms of compensation thus owed to community, employee's spouse was *at all times vested* with one-half ownership interest in compensation, including incorporeal, moveable right to share subsequently in proceeds of retirement and profit-sharing plans,[2] but further giving

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1. La. Civ. Code arts. 2325 *et seq.* *See also* La.Civ. Code arts. 86 *et seq.* and 889-890.1

2. Despite contrary positions taken by petitioner and U.S. Solicitor Gen-

recognition to then state statutes preserving integrity of such plans and limiting plan administrator's liabilities and responsibilities and (citing then La. Civ. Code art. 21, now La. Civ. Code art. 4) approving of procedure of equitable accounting among parties according to precise nature and proportion of each's interest, after distribution of proceeds[3]).

Anytime that Congress might statutorily attach unique, federal common law rules of property to certain money and displace the state's underlying civil law rules determining true ownership applicable to all other property within the state, simply because that money had been in an ERISA-qualified plan before its disbursement, the wholesome balance of good public order and equity with respect to private property rights in the state is necessarily threatened. It is submitted that such was not the intent of Congress in enacting ERISA; indeed, the beginning presumption is that Congress had no such intention. *Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740 (1942); *Rice, supra*, at 230. Moreover, an interpretation of ERISA to avoid such a result would obviate future constitutional challenges that ERISA deprives owners of vested property rights and destroys the expectation of mu-

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eral, in Louisiana's civil law, the rights to delivery and possession are lesser-included rights which may be dismembered from ownership without a loss of ownership; ownership of property in civilian law may come into existence without a procedural act for actual delivery and possession or any other lingering vestige of common law feudal investiture. Accordingly, the ownership interest in compensation paid by the employer in the form of the retirement and profit-sharing plans does not wait until disbursement of proceeds from the plans before vesting.

3. The precise nature and proportion of each of these particular parties' interests were left pending in the state court proceeding brought by respondents; the state's highest court has not yet determined whether, or to what extent, an equitable accounting might be required of petitioner (or a person in this precise situation) or whether any accounting due would only be

tuality had by those in having contracted marriage in Louisiana and would thereby preserve ERISA's salutary purpose of renewing the fiduciary commitment of employers and plan managers to maintain solvency in their pension plans. In submitting this brief, Louisiana asserts its interest in the validity of its laws as they affect the state's good public order, should the other parties, in their quests for narrower goals, be indifferent to the potential consequences.

SUMMARY OF ARGUMENT

Community property is today considered the progressive system of marital property. Its partnership theory rectifies gender discrimination in the labor market. For example, Census Bureau statistics from 1991 show monthly pension distributions to married men are larger than those to married women by a ratio of 74 to 19. Once pension funds are distributed to spouses, community property law provides that they share them equally if earned during marriage.

It is impossible to find in ERISA some sort of covert message that community property is contra to federal policy. To the contrary, section 1056(d) specifically endorses "community property law" as the basis for a QDRO award and recognizes that the interest of the spouse of the employee exists under state law before such a court order.

Both Congress and this Court have long understood that the interests of spouses in community assets are equal. If the participant's wife has no interest in funds distributed out of a pension fund so that they are owned 100 percent by Husband, there is no equality. If Wife has no interest when the marriage ends by death, there is no equality. Yet Petitioner insists Wife has no interest until she divorces her husband. That just is not the "community property law" that section 1056(d) acknowledges.

ERISA's preemption section does not require this Court to concoct—under the rubric of preemption—a new federalized version of "community property" in which Husband's interest is much bigger than Wife's. A workable bright-line rule for pre-emption issues is this: state law has no application until pension funds are distributed out of the pension plan since the purpose of ERISA is to assure that plans are well-administered by fiduciaries who are freed from interference from state orders and state law claims. Once funds are distributed, state law fully attaches. State income tax is owed. State law defining what is a fraudulent use of the funds applies. All aspects of state property law apply.

The same bright-line test applies to the anti-alienation section of ERISA. Plan administrators are to ignore instructions from a participant to pay benefits to some third party (such as a creditor). However, once funds are distributed, they may be used, for example, to buy furniture and as the basis for a birthday gift to a relative—both alienations.

Under this sensible bright-line rule, the timing of an alienation document is irrelevant under ERISA so long as it has no impact on pension plan administrators and no effect *in rem* on pension funds until they fall under the control of state property law after distribution.

Example: Husband, Wife, and the parents of each sign in May an estate planning document in which each agrees to contribute $100,000 to a trust for the spouses and their children, with Husband promising to draw his $100,000 from a lump sum retirement payment he will be receiving in July. There is nothing in ERISA to prevent his undertaking from becoming binding after the funds are in his hands.

State law would apply similarly if in May Wife signed a will leaving her community half interest in the anticipated lump-sum distribution to her children, in June she died, and in

July the funds came into Husband's hands. Or the asset could be Wife's interest in attorney-Husband's contingent fee contract, with Husband winning his case after her death. Contingent interests are property under the laws of all states and are routinely subject to testamentary disposition. In *Boggs*, because of a unique Louisiana statute, Wife's will did not act *in rem* on pension benefits earned during marriage but to be distributed after her death. Husband was free to do as he wished with such funds, but the Boggs children did obtain through their mother a right to have the estate of Mr. Boggs restore funds equivalent to Wife's half interest. That is, what they inherited from Mother was a cause of action for an accounting.

Even if ERISA specifically announced that Wife could have no interest in pension funds distributed to Husband, such preemption would not deprive her of an alternate remedy. Surely Congress could not object if the state restored equality between the spouses by holding that when such a large block of earnings of one spouse are outside the standard marital partnership, community property does not apply to the marriage. Wife can treat her earnings as hers alone, including a non-ERISA pension she earned (e.g., as a state employee).

Another way the state could restore equality is to apply community property law to the marriage to the extent possible but to treat Wife as sole owner of one asset that would have been community (including cash) equal in value to what would have been the community interest in Husband's pension but for preemption. Such an "equalization" award is not a penalty imposed on Husband for having an ERISA pension but proper application of what is called the "aggregate theory" of community ownership long employed in Arizona. It is just such an equalization remedy that the Boggs children, claiming through their mother, seek to pursue in Louisiana courts.

Louisiana's proposed "bright line" interpretation of

ERISA's preemption and anti-alienation sections—building on the express endorsement in the QDRO section of "community property law"—is "fairly possible." As such it must be chosen over the construction that Wife can enjoy her state-law community property rights only if she divorces her husband. That theory involves Congress denying to the state the power to apply its own marital property laws to its citizens both during the marriage (after funds are distributed) and at dissolution of the marriage by death. There are serious doubts whether the Commerce Power authorizes Congress to effectuate such a major displacement of state domestic relations law, since the only theory for doing so could be the "national productivity" notion rejected in *United States v.Lopez*, 115 S. Ct. 1624 (1995).

ARGUMENT

Introduction

Petitioner, joined by the United States, here launches a direct attack on Louisiana's historic marital property system in which spouses share gains during marriage equally. They say that in the case of a spouse participating in an ERISA-governed pension plan who never divorces, all of the plan benefits, even after distribution out of the pension fund, must be owned solely by that participant spouse.[4] His wife's interest under community property law is stripped away, because only a Qalified Domestic Relations Order (QDRO) at divorce can recognize it. The pension for many couples is the most valuable of all assets that can be owned in community. *See Marriage of Brown*, 15 Cal.3d 838, 847, 126 Cal. Rptr. 633, 638, 544 P.2d

4. The participant here was Mr. Boggs. More men than women are ERISA-plan participants. U.S. Department of Labor, Pension and Health Benefits of American Workers at p. C-1 (1994). To avoid the cumbersome "participant spouse," this brief assumes the Husband is that individual.

561, 566 (1976). Indeed, in the case of a defined contribution plan with contributions well invested, the pension value at the time of Husband's retirement can exceed the total of all his earnings during the marriage, most of which will have been consumed.

Petitioner's theory will cripple Louisiana's community property system and that of similar community property states by making one spouse's share of the gains during marriage larger than that of the other spouse (unless, which will rarely be the case, both spouses have ERISA pensions equal in value). In some marriages, there will be other property constituting gains during marriage sufficient in value to enable the state to respond to the interference in spousal equality by making an offsetting award to the wife. But petitioner insists that Congress, through the preemption clause of ERISA, also prohibits such an attempt to restore equality.

In sum petitioner demands that Louisiana and other community property states mix marital partnership law with sole-ownership law derived from English common law and enforce against wives a 60-40, 70-30, 80-20, or even more unbalanced marital "partnership." Only if Wife will divorce Husband, says petitioner, can she enjoy an equal community of property. Perversely, she must end her marriage to obtain the martial partnership benefits of marriage.

Here is an example of the kind of unequal community Petitioner would foist on states like Louisiana. Both spouses, childless, have retired after many years on the job. Husband worked for a company with an ERISA-governed pension plan. He is receiving monthly benefits that, under petitioner's theory, are entirely his. Wife worked for the state and is receiving distributions from the state's civil service plan. These funds are community property because, petitioner insists, Louisiana cannot declare them her separate property in order to help

equalize the sharing between the spouses of gains during marriage. Each spouse uses monies from his or her pension distributions to buy lottery tickets, and each wins $500,000.

According to petitioner, Louisiana must let Husband bequeath $750,000 to his relatives but Wife can bequeath only $250,000. Moreover, petitioner's theory demands that Husband's creditors can reach the full $1 million, while Wife's can reach but $500,000, a problem for the wife if the amounts were smaller and she sought to be approved for credit purchases. La. Civ. Code art. 2345. If he acts promptly, Husband can control the investment of the full $1 million, Wife, only her winnings, which are community property subject to equal management. La. Civ. Code art. 2346.

Probably most community property states will have to respond to such a state of affairs by abolishing community property, making the spouses tenants in common of what is in the community at the time, and shifting to an English common law approach to ownership of future acquisitions.

Petitioner claims Congress actually intended to compel Louisiana either to enforce an unequal community system or abandon community property. This brief will demonstrate that Congress had no such intent.

I. ERISA does not preempt the substantive components of Louisiana community property law.

A. Community property is a sensible system for dealing with marital property, and Congress has no reason to seek to undermine it.

In 1983, the National Conference of Commissioners of Uniform Laws promulgated the Uniform Marital Property Act (UMPA), which adopts community property as the model this respected organization considered the best to deal with marital property issues. The prefatory note to UMPA declares that marriage is a partnership and that American states had lagged behind foreign nations in recognizing this through marital property laws. 9A Uniform Laws Annotated 97 (1987). The theme of UMPA is "ours," not "his and hers." *Id* at 99.

Wisconsin, which had been a "his and hers" state, soon enacted UMPA. Wis. Stat. Ann. §§766.001 *et seq*. (1984). Thus, any "trend" in the United States in the field of marital property, however small, favors community property over the separate property system built on English common law. In the noncommunity property states many couples achieve something similar by combining the earnings of both in one joint bank account, making it impossible for courts and lawyers to determine what should have been "his and hers" under a the common law system.

Community property arose in continental Europe as a means of recognizing the contribution of working wives that English law did not. The system was directed at working class families — farmers and herders. Michael J. Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 Baylor L.Rev. 20, 28-39 (1967). In these families both spouses worked in the fields to raise crops and animals. Neither received a paycheck. There was no way to quantify the contribution of Wife or Husband to the success of the family operation. The logical solution was to treat them as partners.

A small number of couples still work together in the farmer-herder tradition. But it was not for them that Louisiana chose to retain community property as families became primarily urbanized in the first half of the 20th century. The new "mold" was for Husband to work at a job where he earned a paycheck, while Wife stayed home to take care of their home and usually raise children of the marriage. The work of the stay-at-home wife released the husband from home-based du-

ties performed by husbands of the farmer-herder days. The husband of the new mold had more hours to devote to making money due to the labors of the wife. In some situations she would entertain his business associates, but usually her contributions to the family wealth were indirect. During this stage of evolution of the American family, community property was lauded for giving the wife an ownership interest in gains she substantially, if indirectly, assisted her husband to acquire. Vaughn, *supra*, at 38.

Today the typical family is now headed by a two-earner couple. Both work outside the home. But community property continues to be a very sound approach for dealing with marital property problems of modern couples. First, it solves the "mommy track" problem. Working women with children often take time away from career advancement when the children are young, before returning to the labor market when the children are in school. When they re-enter the labor force, they have fallen behind the pace of advancements in rank and wage increases enjoyed by co-workers, many of them married men who have worked full-time while their wives took time out for parenting. The 1995 median weekly earnings of full-time employed married men was $610 and married women was $424. U.S. Bureau of Labor Statistics, Division of Labor Force Statistics Table A-4 (unpublished, 1995). Community property combines into a partnership "pot" the earnings of the wife who fell behind while following the "mommy track" with the earnings of her husband, who did not.

The second reason why community property well serves the typical two-earner couple of the beginning of the 21st century is its partial solution of the problem of lingering gender discrimination in the market place. Even women who have not taken time out for parenting, on average, earn less than

men.[5] Community property achieves equalizing through the marital partnership.

The equalizing achieved by community property law is most acutely needed with respect to distributed pension funds. According to Census Bureau figures for December 1991, the monthly income from pension distributions for married men in all states was $7,437,000, but for married women just $1,907,000.[6] This disparity must be caused in part by gender discrimination in employment and "mommy track" problems rather than solely the phenomenon of the stay-at-home wife earlier this century.

It is hard to imagine what objection Congress could have to a marital property system that deals so well with the mommy track and the gender discrimination issues. Congressional hostility is especially improbable in light of the rule in all nine community property states that this legal system of marital property is not mandatory. Spouses at the time of marriage or any time during it may contract for a "his and hers"

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5. The average annual income from full time jobs held in April, 1994 for 1992-93 bachelors degree recipients was $28,131 for men and only $22,853 for women; when income of these recent graduates is compared according to their undergraduate major, women's income exceeded men's in only three out of 12 categories: engineering, biological sciences, and humanities. Source: U.S. Dept. of Education, NCES, B&B: 94 Baccalaureate and Beyond 10/16/96. Computation by DAS-T Version 0.50. Recently graduated females are unlikely to have lost ground due to the "mommy track." *See also* Clifford Adelman, Women at Thirtysomething: Paradoxes of Attainment (U.S. Dept. of Education, 1992): "In only 7 of 33 major occupations did women achieve pay equity with men. In five other occupations, four of them in business-related fields, women who took more than 8 credits in college-level mathematics achieved pay equity. Outside of these areas and these conditions, however, the men of the Class of '72 were paid more than the women without children no matter what unit of analysis is applied."

6. U.S. Dept. of Commerce, Bureau of the Census Statistical Brief: Preparing for Retirement, Table I (1993)

marital property system applicable to them. La. Civ. Code art. 2328.

Even if many members of Congress — a modest majority of whom are from noncommunity property states — considered the common law approach to marital property superior to community property, no case has been made in Congress that the latter system is so foolish that there must be a federal policy to eradicate it. Indeed, the opportunity for dealing a perhaps fatal blow to the community property system was before Congress in 1948. An income tax crisis was brewing in the mid 1940s as several common law states including Pennsylvania, Oklahoma, and Hawaii shifted to community property for the sole purpose of income splitting (attributing to a stay-at-home wife half her husband's earnings to keep him out of a higher tax bracket). Congress, of course, chose to accommodate the community property states by authorizing income splitting for couples in all states.

B. ERISA evinces no congressional intent to bar states from treating as community property funds distributed from pension plans to a spouse

1. The REA amendments specifically embrace community property. Petitioner contends that the serious invasion by Congress of an area traditionally and rationally regulated by state law is compelled by the preemption section of ERISA, 29 U.S.C. § 1144(a). It provides that state laws which "relate to" ERISA pension plans are displaced. This Court recently held that "relates to" is so broad it cannot be taken literally in section 1144(a). *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1674, 1677 (1995). The phrase cannot even be defined by the Court. Rather preemption must be dealt with on a case by case basis based on "the objectives of the ERISA statute." *Id.* at 1680. In sum, the pre-

emption clause must be given a "common sense" meaning. *Pilot Life Ins Co v. Dedeaux*, 481 U.S. 41, 47 (1987).

An example of how the "common sense" approach to ERISA preemption would apply is apparent. Suppose Husband uses $250 worth of pension funds to buy a TV set, and the store insists he pay a six percent sales tax as well. He contends taxing his use of pension funds "relates to" the ERISA plan and refuses to pay. Common sense says this argument is absurd, and the reason is that once funds are paid out they become subject to state property laws, including tax laws. Petitioner and the United States assert ERISA "protects" Husband from claims by his wife, but that theory would lead to his also being protected from the state tax collector.

Blue Cross suggests that to assist the "common sense" approach to ERISA preemption, the starting point in the case by case analysis is what Congress specifically has said in ERISA about the state law allegedly preempted, here community property law. The section of ERISA that defines a QDRO refers specifically to community property. 29 U.S.C. §1056(d)(3)(b). A QDRO means a court order "which creates *or recognizes the existence of an alternate payee's right* to . . . a portion of the benefits . . . [and] is made pursuant to a State domestic relations law (*including a community property law*). § 1056(d)(3)(b)(i)(I) and (ii)(II) (emphasis added).

The phase "recognizes the existence of" when contrasted with "creates" can only refer to a community property interest, and it shows Congressional awareness that community property interests come into existence during the marriage, not just at the time of divorce. The theory of the United States that a wife could have no community property interest in the funds distributed from her husband's plan to him is flatly inconsistent with this passage of ERISA recognizing a spousal interest that arose before the divorce action. If, as is argued, the wife

has no interest during marriage, a QDRO could only "create" something new in the wife and could not "recognize the existence of" an interest she already had.

Other acts of Congress also reveal its understanding that under community property law the wife's interest in the husband's earnings arises not at the end of the marriage but during marriage. An Internal Revenue Code provision dealing with a tax benefit declares that for purposes of the earned income credit, the taxpayer's income "shall be computed without regard to any community property laws." 26 U.S.C. §32(c)(2)(B)(i). This is directed at a taxpayer claiming a credit during marriage and would not have been necessary if his spouse's community property interest were not already vested in her under state law.

Since ERISA itself in section 1056(d) recognizes that wives in community property states have an interest in the husband's pension before a QDRO is signed, petitioner cannot benefit from the theory of this Court in *Wissner v. Wissner*, 338 U.S. 655 (1950) to explain why the federal statute involved there did not have the effect of authorizing a husband to seize his wife's property rights. In *Wissner* a husband was permitted to direct distribution to his mother of 100 percent of national service life insurance he had earned during marriage. The Wife's complaint that this necessarily included her half interest under California community property law was rejected by this Court, which held that "[t]he statute establishes the fund in issue and forestalls the existence of any 'vested' right [in Wife] in the proceeds of federal insurance." 338 U.S. at 661. But the QDRO section of ERISA refers to a wife's community interest that already has an "existence" rather than being created by the QDRO. The interest is not "foresetalled" until the QDRO is entered.

Assuredly, the QDRO provisions added to ERISA by REA preempt state procedural laws concerning community rights

during marriage. Congress's intent is to protect pension plan administrators from possibly inconsistent (or vague) state court orders. A community property state could not compel the plan administrator to yield to a state court order requiring a pre-retirement distribution to Wife of her half interest in the community's portion of plan benefits because she was ill. But absence of such a remedy does not mean the wife's interest has no "existence." So long as state law does not impact on plan administrators but rather only on the spouses and those claiming through them, the common sense approach to ERISA preemption requires a holding that no state family property law needs to be displaced to effectuate federal interests.

2. The wife's interest does not arise by alienation or assignment from her husband. The wife's interest does not, as petitioner contends, come to her by alienation or assignment from the husband. Her ownership arises by operation of law.[7] Indeed, this Court long ago so held in its decisions authorizing a husband in a community property state to report his income as half owned by the wife. *Poe v. Seaborn*, 282 U.S. 101 (1930). If the theory of community property were that Husband acquired 100 percent ownership when he was paid but then transferred half to his wife, he would have been taxable on all of it before 1949.

In his dissent below, Judge Wiener termed Mrs. Boggs' will a prohibited alienation, assuming she was co-owner. 89 F.3d at 1182. Yet her will did not purport to divert benefits from Husband or any other beneficiary in advance of receipt of the benefits. On petitioner's theory not even Mr. Boggs could spend

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7. La. Civ. Code art. 2327, 2334, 2336. ("Legal regime" of community in Louisiana terminology means that the community property rules apply by operation of law, "legal" meaning "by law" as opposed to "by contract or assignment." See also *T.L. James & Co., Inc. v. Montgomery*, 332 So.2d 834, 851 (La. 1976).

any of the distributed funds to buy food, clothes, the TV set in the hypothetical, etc. These are alienations. Obviously the anti-alienation provision of ERISA, 29 U.S.C. §1056(d)(1), is restricted to alienations or assignments which the plan administrator is supposed to honor when making subsequent distributions. To protect plan administrators, ERISA allows such assignments to be ignored.

The United States seems to say that the first Mrs. Boggs's will may have been effective to bequeath a half interest in funds already paid out to her husband and on hand at her death but could not affect future distributions. This is inconsistent with the REA language stating that a community property interest of a participant's wife is in "existence" prior to divorce even though there has been no distribution. Not a word in ERISA suggests there is no such existence when death dissolves the marriage, instead.

Louisiana law has long recognized that community property rights of a wife exist in contingent interests earned by Husband that may vest after the marriage has ended or may never vest. An attorney-spouse's contingent fee is an example. *Dué v. Dué*, 342 So.2d 161 (La. 1977). If Wife dies while husband is trying the case, her will of her community share of the fee will be effective if Husband wins but of no use to her legatee if he does not.

Moreover, the United States and petitioner fail to deal with the fact that under Article 538 of the Louisiana Civil Code, what respondents received under their mother's will was not a right *in rem* in any pension funds Mr. Boggs might later receive. He could do whatever he wanted with those funds; at Mr. Boggs's death his estate was liable to account to respondents. *Id.* Their acquiring the cause of action to compel an accounting is far removed from any alienation of an interest in specific funds to be distributed.

3.ERISA does not seek uniformity, nor would uniformity be achieved by the kind of preemption petitioner seeks. The United States argues that preemption of Louisiana law is essential to avoid "a multiplicity of possibly conflicting state regulation" of pensions. Brief Amicus Curiae for United States at 24. ERISA does indeed seek the benefits of a uniform law to guide pension plan trustees in their administration of the plans. But section 1056(d) makes it clear that Congress has determined uniformity is not needed with respect to a wife's rights in the husband's pension plan. This section of ERISA defers to state divorce courts to award the wife a half interest as community property, an equitable distribution share of one third, two thirds or any fair share. The state court is free to award nothing at all if the state uses "fault" principles in dividing marital property and the wife was, for example, an adulteress. 29 U.S.C. § 1056(d)(3)(C). ERISA also gives the state court the option to order payouts to the wife on the date the ex-husband could retire but does not, or to wait until he does retire. *Id.*, subsection (E).

Moreover, if ERISA demands uniformity, the unequal community theory petitioner says Congress is forcing on community property states (See Part II, *infra*) has to be applied in common law states as well. In fact, substantive uniformity could be obtained only if the courts were to fashion a *detailed federal common law system of marital property*.

It is *procedural* not substantive uniformity that ERISA seeks. Plan operators can disregard any court order not in the form of a QDRO. The intra-family litigation in the case at bar has no impact on plan administrators.

Moreover, even if Congress tried to directly abolish community property across the United States and impose on all states via the Supremacy Clause a uniform marital property system, because of Due Process considerations, it would take

decades to achieve the goal. Millions of wives now have vested interests in marital assets, at least those other than an ERISA pension in the husband's name. And there are also still alive millions of wives that had ownership interests in pensions before enactment of ERISA in 1974 when many pension plans came under the control of that statute. Under the Fifth Amendment Due Process Clause these property rights of wives will endure until all such women are dead.

II. ERISA does not compel Louisiana to enforce an "unequal" community property system; thus the state can make an equalizing award to accommodate limited preemption while retaining the essence of community property theory.

Assume arguendo that the courts below erred in holding the legatees of the first Mrs. Boggs could ask the state courts, in their action to account, to classify as community property of the first marriage sums paid out by Mr. Boggs' pension plan. Due to preemption the first Mrs. Boggs could have no interest *in rem* in those funds. It does not follow, however, that respondents have no remedy at all. They should be entitled to pursue in state court a right derived from their mother to remedy the disruption of equal sharing of gains resulting from the preemption holding. The Boggs children will assert their mother's rights to an equalizing award. That is, if Husband can withdraw a major asset from the community partnership, to maintain an equal partnership Wife can claim sole ownership of other assets of equal value (including money) that would have been community.

In other words, the Boggs children urge that Louisiana can respond to the fact that Mr. Boggs claims sole ownership of the pension in his name by employing, when the marriage ends at death, the "aggregate" rather than the item theory of community ownership. Louisiana employs the aggregate theory at divorce. La. R.S. 9:2801. This allows a court to award a wife the

entire community interest in, for example, a residence and the husband the entire interest in a community business of equal value.

At dissolution of marriage by death, on the other hand, a majority of community property states employs an "item" theory that permits the deceased spouse to bequeath only his half interest in each community asset. William A. Reppy, Jr. and Cynthia Samuel, *Community Property in the United States*, 19-5 (1994). However, Arizona has long used the aggregate theory at death of a spouse, allowing, for example, the first to die to have $200,000 in community property proceeds from a community-owned policy on his life go to a third party if he devises a $100,000 interest in his share of other community assets to the surviving wife. *Gaethje v. Gaethje*, 8 Ariz. App. 47, 442 P.2d. 870 (1968).

Respondents are not precluded by ERISA from asking Louisiana to follow the Arizona precedent at dissolution of the marriage by death. An "equalizing" remedy is not some sort of penalty imposed on a husband for invoking rights under ERISA. Instead, it is a reasoned response rooted in ample precedent to avoid the state's having to recognize a 60-40, 70-30, etc. "community."

At the very least, if Louisiana itself cannot, by adopting in the dissolution by death context the aggregate theory it uses at divorce, respond to the problem of the unequal community, *federal common law* must do so. Petitioner seems to have lost sight of the fundamental principle that when the Supremacy Clause results in displacement of state law, it is *federal common law* that fills the gap. *See Lividas v. Bradshaw*, 114 S.Ct. 2068 (1994). Unfortunately, as this Court noted in *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), there is no existing body of *federal common law* for domestic relations to draw on that might have been developed under the reign of *Swift v. Tyson* or in federal question litigation.

True it is that in a few cases of "gap" in a federal statute — often due to failure to provide a limitation of action period — state law is chosen to fill it. *See Board of County Commrs v. United States*, 308 U.S. 343 (1939). Petitioner attributes to Congress a scheme that borrows Louisiana law that all earnings during marriage are co-owned by spouses with the theory drawn from common law that the husband is sole owner of the pension in his name. *County Commissioners* makes clear that the resulting hybrid (the unequal community) must have come from *federal common law.* It is totally foreign to Louisiana.

Congress would not tolerate such a concoction, especially since, as indicated above, it has significant disparate impact on women because fewer wives than husbands earn pensions in their names, and for those wives that do, the value is on average smaller than the value of the typical husband's pension. It is far more likely that if Congress, as contended by petitioner, actually intends to bar community property states from granting the wife or those claiming through her an equalizing award, the federal common law to solve the problem created by ERISA preemption with respect to Husband's pension would be borrowed from the modern common law of one of the noncommunity property states. That is, Louisiana could, rather than restore an equal community through application of the aggregate theory, hold that the marriage is governed by the majority rule that Wife is sole owner of all she earned, Husband of all his earnings.

Since many Louisiana couples presently own as community an ERISA-governed pension, to shift via federal common law to a "his and hers" approach would be highly destructive of the community property system and create two classes of married persons in the state. Or should the federal common law rule based on English common law be applied to all Louisiana marriages, to prevent the problem of dual marital property systems?

This court, in *United States v. Yazell*, 382 U.S. 341 (1966), indicated its distate for creating federal family law. It avoided doing so by borrowing all aspects of state family law at issue rather than concocting a federal-state hybrid based on partial borrowing. This Court declared that the alternative with regard to the need to find some body of family law so a federal scheme could be implemented was "We should . . . invent one and impose it on the states." 382 U.S. at 353.

Petitioner cites *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), and *Wissner v. Wissner*, 338 U.S. 655 (1950) and *Free v. Bland*, 369 U.S. 663 (1962) as support for her theory that ERISA forbids Louisiana from making an equalizing award if Mr. Boggs can withdraw his pension from the gains co-owned in community. Brief for Petitioner at 19-20. *Hisquierdo* and *Wissner* are distinguishable because they dealt with a husband's claims to federal disbursements of federal funds. This Court itself in *Hisquierdo* distinguished a government pension from a private pension merely regulated by ERISA. *Hisquierdo*, 439 U.S. at 590 n.24. *Free v. Bland* was largely superseded by *Yiatchos v. Yiatchos*, 376 U.S. 572 (1964), which allowed states to bar a husband's manipulation of federal statutes, such as those concerning U.S. savings bonds, to strip their wives of testamentary powers. Moreover, it appears from the brief discussions about no offsetting award that this Court was not fully aware in these cases of the effect of creating an unequal marital property system as a matter of federal common law with especially strong disparate impact on women.

III. The construction of ERISA that interferes with basic principles of family law in Louisiana must be rejected because it raises serious constitutional problems while another reasonable construction does not.

When one construction of a statute "would raise serious constitutional problems," *Edward J. DeBartolo Corp. v. Florida*

Coast Bldg & Constr. Trades Council, 485 U.S. 568, 575 (1988), this Court will adopt a construction that avoids constitutional issues, if that is "fairly possible." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).[8] Congress invoked both its Commerce and Taxation powers as authorizing enactment of ERISA. 29 U.S.C. §1001. Only the Commerce Power could possibly permit Congress to displace state family laws providing for equal sharing by spouses of gains during marriage. *United States v Lopez*, 115 S. Ct. 1624 (1995), raises a real doubt as to the constitutionality of ERISA as Petitioner would have it applied. This Court thus should adopt the "fairly possible" interpretation that leaves state community property laws substantively intact.

A. Co-ownership by spouses of pension benefits has no nexus to interstate commerce. Congress was correct in declaring in section 1001 that the process of administering pension plans is part of itnerstate commerce. The section also properly asserts federal power to control aspects of such administration listed there: vesting requirements, funding minimums, and the like. Congress's assertion of the Commerce Power in order "to protect . . . participants" in pension plans is confined in section 1001(b) to administrative concerns: "establishing [via ERISA] standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and . . . providing for appropriate remedies, sanctions, and ready access to the Federal courts."

REA's procedural preemption of state divorce law by requiring use of QDROs to protect plan administrators from the

8. This maxim of construction was not invoked in the lower courts. However, statutory construction was the issue litigated in both the trial court and the Fifth Circuit, permitting a new twist on the interpretation to be made for this first time in the Court. *United States v. Speers*, 382 U.S. 266, 277 n. 22 (1965) ("novel" interpretation argument property raised for first time in Supreme Court).

burden of uncertain judgments also assists the free flow of commerce. Congress also has the power to address the issues raised in this case by requiring QPOs (qualified probate orders). In each of these applications of ERISA the nexus to interstate commerce is clear.

Federal interference with state law of family property —especially when state law attaches only to benefits after they are paid out of a pension plan — is a very different issue. Petitioner and the United States seem to impute to Congress the notion that community property is bad for commerce. Even an explicit statement by Congress to that effect would not eliminate Tenth Amendment problems. A federal interest in safe schools did not create a nexus to interstate commerce in *Lopez*. Likewise, federal dislike of community property cannot itself create a nexus to interstate commerce. This Court requires that the nexus be actually demonstrated.

In only one prior case has this Court considered the constitutionality of a federal law construed so as to preempt state community property law. *Wissner v. Wissner*, 338 U.S. 655 (1950). *Wissner* involved exercise by Congress of the War and Defense Power, and the morale of servicemen who will be called on to repel an invasion of the nation is of genuine federal concern. But this analysis cannot be transferred to the context of private workers in interstate commerce. The idea that happy workers produce more and hence the federal government can do anything it wants to make them happy is just a restatement of the "national productivity" theory for invoking the Commerce Clause rejected in *Lopez*. 115 S. Ct. at 1632. Just as in *Lopez*, under the happy-worker "reasoning Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id*.

B. There is no nexus to interstate commerce in a state's ac-

tions in intra-family litigation to equalize overall spousal interests in gains during marriage after limited federal preemption. Assuming arguendo that Congress has the power to declare the employee husband sole owner of pension funds after distribution from an ERISA-governed plan, although they would be community property under state law, a second serious constitutional problem arises. Does the Commerce Power entitle Congress to forbid a state, in litigation not involving plan administrators but rather affected family members themselves or against the estate, from entering what this Brief has termed an equalizing award?

This requires the Court to inquire if there is any impact on interstate commerce if Louisiana takes corrective action to make equal a community of property that has become unequal. Whatever theory petitioner may invoke to find in the Commerce Clause a power to compel Louisiana to accept an unequal community will be indistinguishable from the "national productivity" theory rejected in *Lopez*. Petitioner's theory necessarily would enable Congress to take from the states control of every detail of marital relations law from the moment of marriage to its dissolution by divorce or death.

These serious constitutional problems also mandate adoption of the construction of ERISA urged by respondents and Louisiana.

CONCLUSION

For the foregoing reasons, Louisiana urges this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1996

SANDRA JEAN DALE BOGGS,

Petitioner,

vs.

THOMAS F. BOGGS, HARRY M. BOGGS, and DAVID B. BOGGS,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS AND BRIEF OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine*, 14 Sw. U.L. Rev. 613, 616 (1984) reprinted as *Toward Pension Equality: A 'Death Blow" to California's Terminable Interest Doctrine*, 12 Comm. Prop. J. 199 (1985) 23

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENTS

The Estate Planning, Trust and Probate Law Section of the State Bar of California respectfully requests leave to file an *amicus curiae* brief in support of the position of the Respondents. The Petitioner has withheld consent to the filing of this brief. Notwithstanding Petitioner's withholding of consent to the filing of this *amicus curiae* brief, the Respondents have generously consented to the filing of no less than two *amicus curiae* briefs in support of the Petitioner.[1]

The Supreme Court's decision in the case of *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 397 (U.S., Nov. 1, 1996) (No. 96-79), will affect millions of United States citizens of all economic circumstances. The Court must weigh the doctrine of federal preemption against traditional state law rights in order to reconcile the conflict between the Fifth Circuit Court opinion in *Boggs, supra* and the Ninth Circuit Court opinion in *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991). The issues involved have been debated and closely followed by estate planning lawyers, pension plan administrators, legal commentators, the Department of Labor, and numerous state legislatures.

It is estimated that the almost 80 million residents in the nine community property jurisdictions have as much as one trillion dollars in qualified retirement plans.[2] The Supreme Court's decision in the *Boggs* case will directly and profoundly affect those residents' lifetime and testamentary rights in those dollars. California is the largest community property jurisdiction and the most populous state in the nation. For a

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[1] Respondents gave written consent to Employers Council on Flexible Compensation and to the American Association of Retired Persons (AARP) to file *amicus curiae* briefs in support of Petitioner. Both written consents have been filed with the Clerk of this Court pursuant to Supreme Court Rule 37.3.

[2] To arrive at this estimate, U.S. private pension assets as of 1991 have been allocated according to population by state. Source: Employee Benefits Research Institute and 1990 U.S. census.

married couple in California, a retirement plan benefit is often the single largest asset of their estate.

The Estate Planning, Trust and Probate Law Section of the State Bar of California (the "Section") is one of many volunteer sections of a Bar representing over 120,000 lawyers. The Section consists of approximately 5,700 lawyers who practice in the estate planning field and who are advisors for over 30 million California residents on their rights and options for disposition of their retirement plan benefits.

After this Court granted certiorari in *Boggs*, the Executive Committee of the Section voted unanimously to seek, and subsequently obtained, approval of the State Bar of California Board of Governors to file an *amicus curiae* brief with the Supreme Court. Such approval is rarely granted. The critical importance of this issue to California residents persuaded the Board to grant approval.

Members of the Section must be able to properly advise their clients, with confidence and clarity, as to what testamentary rights California spouses have in retirement plan benefits. The disposition of plan benefits is one piece of a complex set of rules for estate planning which calls into play both state property law principles, and federal estate, income, and excise tax rules.

The interplay between state community property law principles and ERISA is exceedingly complex, particularly with respect to the rights of a nonparticipant spouse who predeceases the participant spouse. In *Ablamis, supra* at 1468, the Ninth Circuit, in a 2-1 decision, held that ERISA, as amended by the Retirement Equity Act of 1984 ("REA"), preempts the application of California community property law principles that would otherwise have recognized the predeceased nonparticipant spouse's testamentary control over her half of the retirement plan assets.

The *Ablamis* decision generated considerable controversy in the estate planning field. In *Boggs*, *supra* at 97-98, the Fifth Circuit, in a 2-1 decision, sided with opponents of the *Ablamis* decision and held that ERISA does not preempt the Louisiana state law community property rights of a nonparticipant spouse, including her right to exercise testamentary control over her share of the participant spouse's retirement

plan assets.

The Section supports the Fifth Circuit's position and believes that the Ninth Circuit's *Ablamis* decision is flawed. The majority opinion in *Ablamis* misapplied existing legal precedent (including decisions of the Court) in concluding that the REA amendments to ERISA reversed the well-established principle that ERISA did not preempt state law community property rights. See, e.g., *In re Marriage of Campa*, 89 Cal. App. 3d 113 (1979), *appeal dismissed for want of a substantial federal question, Carpenters Pension Tr. Fund for N. Cal. v. Campa*, 444 U.S. 1028 (1980); *Carpenters Pension Trust v. Kronschnabel*, 632 F. 2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981).

By eliminating the testamentary rights of the nonparticipant spouse in her community property share of pension benefits, the *Ablamis* majority failed to recognize the restraints on federal preemption and, in doing so, erroneously overrode the unanimous viewpoint of the three state supreme courts in community property jurisdictions that have addressed this issue. Those three state supreme courts unanimously concluded that the nonparticipant spouse can exercise testamentary control over her community property share of the participant spouse's retirement benefits. See *Allard v. Frech*, 31 T. Sup. J. 371, 754 S.W.2d 111 (Tex. 1988); *Farver v. Department of Retirement Sys.*, 97 Wash. 2d 344, 644 P.2d 1149, (Wash. 1982); and *Estate of MacDonald*, 81 Cal. 3d 262, 272 Cal. Rptr. 153, 794 P.2d 911 (Cal. 1990).

Moreover, the *Ablamis* majority misconstrued and misapplied the legislative history behind REA in finding that Congress intended to preempt state community property laws concerning the testamentary rights of a nonparticipant spouse. Properly analyzed, the legislative history behind REA evidences that Congress, at best, intended to enhance the rights of surviving nonparticipant spouses (in both common law and community property jurisdictions) and, at worst, failed to consider, let alone address, the existing testamentary rights of the predeceased nonparticipant spouse in community property jurisdictions.

The Section recognizes that a decision either affirming or reversing the *Boggs* decision may result in some inequities, given the

somewhat flawed and imperfect statutory scheme resulting from the REA amendments to ERISA. Nevertheless, the Section agrees with the position urged by the dissent in *Ablamis*, which stated:

> It is not whether Congress has crafted the most perfect statute possible to meet the goal of affording employees and their spouses lifetime security, . . . but whether state marital property law fundamentally conflicts with the statute that Congress has, in fact, created.

Ablamis, supra at 1466 n. 2 (Fletcher, Circuit Judge, dissenting). The Section likewise agrees with Circuit Judge Fletcher's conclusion that no such fundamental conflict exists and that the current statute "cannot be read as creating the testamentary disenfranchisement of a predeceasing spouse." Id. at 1467 n. 2.

Because the Supreme Court's decision in the *Boggs* case will affect millions of Californians, the Section seeks leave to file the attached *amicus curiae* brief to assist the Court in understanding the community property law principles that govern California residents. The Section is vitally interested in the outcome of this case and requests that the Court carefully weigh the nature and importance of state marital property rights in the context of the Petitioner's request to find all-encompassing federal preemption by ERISA and REA.

The *Boggs* case arises in the context of Louisiana community property law principles. The perspective from California, in which the *Ablamis* case was decided, to be provided by the Section's *amicus curiae* brief, will bring to the Court's attention relevant matters not addressed by the parties.

INTEREST OF THE ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA

The Estate Planning, Trust and Probate Law Section of the State Bar of California (the "Section") is one of many volunteer sections of a Bar representing over 120,000 lawyers. The Section consists of approximately 5,700 lawyers who practice in the estate planning field and who are advisors to the over 30 million California residents on their rights and options for disposition of their retirement plan benefits.

The almost 80 million residents in the nine community property jurisdictions have as much as one trillion dollars in qualified retirement plans.[3] The Supreme Court's decision in *Boggs v. Boggs*, 82 F.3d 90 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 397 (U.S., Nov. 1, 1996) (No. 96-79) will directly and profoundly affect those residents' lifetime and testamentary rights in those dollars. California is the largest community property jurisdiction and the most populous state in the nation. For a married couple in California, a retirement plan benefit is often the single largest asset of their estate.

After the Court granted *certiorari* in the *Boggs* decision, the Executive Committee of the Section voted unanimously to seek, and subsequently obtained, approval of the State Bar of California Board of Governors to file an *amicus curiae* brief with the Supreme Court. Such approval is rarely granted. The critical importance of this issue persuaded the Board to grant approval.

The interplay between state community law principles and ERISA is exceedingly complex, particularly with respect to the rights of a nonparticipant spouse who predeceases the participant spouse. *In Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit in a 2-1 decision, held that ERISA preempts the application of state

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[3] To arrive at this estimate, U.S. private pension assets as of 1991 have been allocated according to population by state. Source: Employee Benefits Research Institute and 1990 U.S. Census.

community property law principles that would otherwise have recognized the predeceased nonparticipant spouse's testamentary control over her half of the retirement plan assets.

The *Ablamis* decision generated considerable controversy in the estate planning field. In *Boggs, supra*, the Fifth Circuit in a 2-1 decision, held that ERISA does not preempt the state law community property rights of a nonparticipant spouse, including her right to exercise testamentary control over the participant spouse's retirement plan assets.

Because the Supreme Court's decision in the *Boggs* case will affect the economic status and property rights of millions of Californians, the Section submits this *amicus curiae* brief to assist the Court in understanding the community law principles which govern California residents. The Section requests that this fundamental system of state marital property rights be carefully weighed in the context of Petitioner's request to find all-encompassing federal preemption of community property by ERISA.

STATEMENT OF THE ISSUES

(1) Does the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as amended by the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1429 ("REA") preempt state community property law and preclude a nonparticipant spouse from disposing at death of his or her interest in the participant spouse's ERISA-regulated plan benefits?

(2) Is there federal preemption of testamentary dispositions of individual retirement accounts in community property states?

SUMMARY OF ARGUMENT

In light of the fundamental importance of a state's community property regime in defining the rights of its citizens, preemption of state community property law by ERISA or REA should not be inferred or implied. When ERISA was adopted in 1974, Section 514 (29 U.S.C. §

1144) preempted state laws which "relate to" federally regulated qualified plans. 29 U.S.C. § 1144(a). In the twenty-two years since ERISA's enactment, the Court and the inferior federal courts have struggled to define the extent and limits of Section 514. In a series of decisions culminating in the express denial to review *Campa*[4] for want of a substantial federal question, the Court confirmed that Section 514 in its original form did not, and was not intended to, preempt domestic relation and community property laws.

In 1984, in reaction to concerns that nonparticipant spouses were being treated unfairly by ERISA, Congress enacted REA and modified the original ERISA statute in some respects. In REA, Congress did not add a provision to the federal pension law which clearly and unequivocally preempted community property rights in the testamentary context. Congress did not articulate an intention to eliminate the testamentary rights of the nonparticipant spouse in community property jurisdictions.

Congress did enact legislation in REA which defined the manner and extent by which state law domestic relations orders could divide pension benefits. With respect to the subject of the nonparticipant spouse's testamentary rights over her or his community property share of qualified plan benefits, Congress was notably silent. It chose not (or more likely neglected) to legislate on this specific issue. Preemption of community property should not arise because Congress omitted to exercise its legislative power.

Congressional action after the enactment of REA confirms that Congress did not intend in REA to preempt the nonparticipant spouse's community property testamentary rights in plan benefits. In repealing Internal Revenue Code § 2039(c) in 1986, Congress recognized that the gross estate of a predeceased nonparticipant spouse will include the value of her community property interest in the participant spouse's pension benefits. Congress cannot have intended to tax an interest which it

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[4] *In Re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028, 100 S. Ct. 696 (1980).

earlier eliminated.

Individual retirement accounts ("IRAs") are not subject to ERISA's preemption rules. Nevertheless, Petitioner also argues that community property rights do not apply to IRAs. Petitioner bases her argument on language contained in the Internal Revenue Code section that governs IRAs.

The Internal Revenue Code provision cited by Petitioner I.R.C. § 408(g), 26 U.S.C. § 408(g), is not a sweeping preemption rule that defeats all community property rights of non-IRA-owner spouses. Rather, its purpose is to provide uniformity in calculating the appropriate IRA deduction for wage earners and the correct taxation of IRA distributions. The Internal Revenue Service has itself acknowledged that community property rights in IRAs are unaffected by the Internal Revenue Code provision. Case law also confirms this result.

ARGUMENT

I. ERISA DOES NOT PREEMPT A NONPARTICIPANT SPOUSE'S TESTAMENTARY CONTROL OVER HIS OR HER COMMUNITY PROPERTY INTEREST IN PENSION BENEFITS

A. Pre-REA U.S. Supreme Court Cases On Preemption Establish A Presumption Of Federal Non-Preemption Of State Community Property Law.

ERISA Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829, codified as amended at 29 U.S.C. §§ 1001 *et seq.*, contains a specific preemption clause. 29 U.S.C. § 1144(a) states in part: ". . . the provisions of this [statute] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [covered by ERISA] . . ." The issue here is the intended scope of this language.

In *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 99 S.Ct. 802 (1979),

the Court set forth the applicable standard of federal preemption of state family property law. The Court stated:

> On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. [Citation omitted.] A mere conflict in words is not sufficient. State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. [Citation omitted]
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> The approach must be practical . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition. *Id.* at 581 and 583 (Emphasis added.)

Hisquierdo can be fairly read to create, in a marital property law setting, a presumption of federal non-preemption of state laws. The party urging preemption has the burden of overcoming this presumption. Thus, to justify preemption the Court must be persuaded that (1) ERISA "positively requires by direct enactment" the preemption of a state's community property law to the extent it gives a predeceased nonparticipant spouse testamentary control over her community property portion of her spouse's pension benefits; and (2) to allow the predeceased nonparticipant spouse to exercise such testamentary control would do "major damage" to a perceived "clear and substantial" federal interest.

A number of non-ERISA related Supreme Court cases have found federal preemption of state family law principles. These cases are heavily relied on by Petitioner and the *amicus* briefs supporting her. This reliance is misplaced; these cases are readily distinguishable from this case.

In *Hisquierdo, supra*, the Court held that Railroad Retirement Act benefits could not be divided upon divorce under state community property law. As another court observed, under the Act

> Congress has 'carefully targeted' the benefits to be provided, consciously 'fixed an amount thought appropriate to support an employee's old age and to encourage the employee to retire,' and specifically limited the extent to which a divorced spouse may reach these assets.

Employees Savings Plan of Mobil Oil Corp., v. Geer, 535 F.Supp. 1052, 1056 (S.D.N.Y. 1982) quoting and summarizing *Hisquierdo, supra*, at 584-585 (Emphasis added). In light of Congress' careful targeting of benefits and specific limitation of the rights of a divorcing nonemployee spouse, the *Hisquierdo* Court concluded that a finding of non-preemption would do major damage to "clear and substantial federal interests." [5]

In *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981), the Court held that the Supremacy Clause of the Constitution precluded states from dividing federal military pay in state divorce proceedings. The Court reasoned that Congress explicitly characterized military retirement pay as a personal entitlement payable to the military member only.[6]

In *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49 (1981), the Court held that the Supremacy Clause prohibited the states from compromising the service member's absolute right to designate the

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[5] *Hisquierdo, supra* at 581, 590. Congress reacted to this Court's finding of preemption. It overruled *Hisquierdo* in 1983 by enacting the Railroad Retirement Solvency Act of 1983 (Pub. L. No. 98-76). This Act specifically provided that the community property division of railroad retirement benefits was not prohibited by federal law.

[6] *McCarty, supra* at 232. Congress also legislatively overruled *McCarty* by the 1983 enactment of the Uniformed Services Former Spouses' Protection Act (Title X, 96 Stat. 730, 10 U.S.C. § 1408, Pub. L. No. 97-252). The Act allows state courts to divide "disposable retired pay . . . either as property of the member or as property solely of the member and his spouse in accordance with the law of the jurisdiction of such court". 10 U.S.C. § 1408(c)(1) (Emphasis added).

beneficiary of his or her choice with respect to federally funded insurance. The Court ruled that "Congress has spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other." *Ridgway, supra* at 56, citing *Wissner v. Wissner*, 338 U.S. 655, 658. (Emphasis added.)

The *Ridgway* "force and clarity" analysis had been earlier used by the Court in *Wissner v. Wissner*, 338 U.S. 655, 658, 70 S.Ct. 398, 400 (1950). In *Wissner*, the Court found that a service member's surviving spouse could not assert a community property interest in the proceeds of a National Service Life Insurance Act policy. *Wissner, supra* at 661.

None of the four cases discussed immediately above dealt with ERISA plans involving privately funded benefits. *McCarty, Ridgway* and *Wissner* dealt with the rights of federal employees to federally funded benefits pursuant to federal legislation which spoke with "force and clarity." *Hisquierdo* dealt with federally funded benefits and federal legislation which precisely targeted the federal interest to be protected and specifically articulated the rights of a divorced spouse. Even then, Congress legislatively overruled the preemptive impacts of *Hisquierdo* and *McCarty*.

In contrast to the federally funded benefit programs discussed in these cases, *Boggs* involves a privately funded benefit program which ERISA merely regulates. In ERISA plans, federal money is not at stake. In a very real sense, participants in ERISA plans use their own money (in the form of deferred compensation) to fund their retirement benefits. [7] In community property jurisdictions, that "money" is co-owned equally by the participant spouse and the nonparticipant spouse. Thus, unlike the spouses in *Hisquierdo, McCarty, Ridgway* and *Wissner*, the nonparticipant spouse in a community property state has basically used her own money to fund her share of the ERISA plan benefits. ERISA

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[7] This concept of "self-funding" is even more appropriate in the context of so-called 401(k) plans, in which an employee is given the option of having a portion of his or her wages withheld from his or her paycheck and contributed to his or her plan account, on a before-tax basis.

was enacted to protect and secure those pension benefits - not to alter fundamental property rights created by state law and respected by federal law.

Indeed, under the holdings of *Hisquierdo*, *McCarty*, *Ridgway* and *Wissner*, preemption will not be found unless ERISA contains language which demonstrates that Congress has spoken specifically and with force and clarity in requiring that a nonparticipant predeceased spouse's community property interest in her spouse's retirement plan benefits evaporates at her death. Yet ERISA nowhere addresses, let alone "positively requires" by "direct enactment," the disposition of community property interests in a pension plan where the nonparticipant spouse dies first.

B. Pre-REA Case Law That Specifically Addressed The Community Property Rights Of The Nonparticipant Spouse Establishes That ERISA Does Not Preempt Community Property Principles.

In *In Re Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), *appeal dismissed*, 444 U.S. 1028, 100 S. Ct. 696 (1980), the California court of appeals held that ERISA did not preempt community property law in the context of the division of pension rights upon divorce. The California Supreme Court denied review of the *Campa* opinion. This Court dismissed the pension plan's appeal for want of a substantial federal question. The *Campa* opinion therefore constitutes a decision on the merits.[8] *Mandel v. Bradley*, 432 U.S. 173, 97 S. Ct. 2238 (1977).

[8] As stated by the Ninth Circuit in *Carpenters Pension Trust for Southern California v. Kronschnabel*, 632 F.2d 745, 748-749 (9th Cir. 1980), "A summary dismissal by the Supreme Court of an appeal from a state court for want of a substantial federal question, when the federal question is properly presented and within the Supreme Court's appellate jurisdiction . . . operates as a decision on the merits. . . The *Campa* appeal definitively presented the question whether ERISA preempts state court orders directing a pension plan to pay a community property share of a participant's monthly benefits to his or her ex-spouse. The Supreme Court has answered that question in the negative. We are not at liberty to disregard the Court's ruling."

The *Campa* court reached its conclusion by examining the Congressional purpose of ERISA vis-a-vis the policy and operation of California community property law. The *Campa* court held that Congress' aim in enacting ERISA did not conflict with or preempt the policy or operation of California's community property law:

> California treats pension rights, whether or not vested, as community property to the extent that they derive from employment during marriage. It does so out of a recognition of the economic importance of pension rights and the need to treat them equitably.
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> *****
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> California law as applicable to the cases before us is concerned with effectuating a fair division of the monthly pension check between the former spouses. This concern plainly has no bearing on the effort of Congress, embodied in ERISA, to assure genuine pension rights. To ask a pension plan to send two monthly checks instead of one does not interfere with any of the Congressional objectives. . . . We will not lightly infer that Congress intended "radical disturbance" of "the federal-state balance" which would result from ousting state regulation of community property in the situations before us.

152 Cal. Rptr. at 368 [citations omitted] (emphasis added).

The *Campa* court also rejected the pension plan's argument that the former spouse's claim violated ERISA's anti-alienation provision found in 29 U.S.C. § 1056(d). The *Campa* court observed:

> The Fund points to ERISA's restrictions on assignment or alienation of pension benefits as evidence of Congress' concern that the pension benefits be preserved intact until an employee reaches retirement age....[These provisions] merely assure[] that the ex-wife partakes of the pension to the extent that it was earned as a result of

the community effort. Her rights are those of an owner, not a creditor.

89 Cal. App. 3d at 125 [citations omitted] (Emphasis added).

In *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied sub nom, Seafarers Union v. Stone*, 453 U.S. 922, 101 S.Ct. 3158 (1981), the divorced wife of a participant in an ERISA-regulated plan tried to enforce a state court decree which awarded her an interest in her husband's pension. The *Stone* court found no "positive requirement" of ERISA preemption by "direct enactment." It found no "major damage" to "clear and substantial" federal interests. It found no "clear and forceful" language in ERISA showing an intent by Congress to preempt community property principles. It found that California's community property laws only have a minimal "tangential relation" to ERISA. In short, the *Stone* court found California's community property laws to be within the narrow category of laws which affect employee benefit plans but which do not "relate to" them within the meaning of § 1144.

The *Campa-Stone* holdings also obtained in numerous other cases. See, e.g. *Carpenters Pension Trust for Southern California v. Kronschnabel*, 632 F.2d at 748-749; *Savings and Profit Sharing Fund of Sears Employees v. Gago*, 717 F.2d 1038 (7th Cir. 1983); *Eichelberger v. Eichelberger*, 584 F.Supp. 899, 900 (S.D. Tex. 1984) ("Federal decisions generally have concluded against ERISA preemption of state law."); *In Re Marriage of Baker*, 204 Cal.App.3d 206, 251 Cal.Rptr. 126 (1988) (a post-REA case which reaches the same holding); and *Western Conference of Teamsters Pension Trust Fund v. Jones*, 646 F.Supp. 228 (N.D. Cal. 1986) ("[ERISA] does not preempt state community property laws affecting the distribution of pension benefits").

C. The REA Amendments To ERISA Do Not Preempt Community Property Principles In A Testamentary Context.

As discussed above, prior to the passage of REA, virtually all courts agreed that REA did not preempt the application of state law community property principles in pension benefits. The clear judicial consensus before REA was that neither ERISA's main preemption clause nor ERISA's anti-alienation provisions applied to the co-ownership rights (and the claims flowing from these rights) of the nonparticipant spouse in a community property jurisdiction.

REA amended ERISA in certain respects. Petitioner and the *amicus* briefs supporting Petitioner argue that REA's amendments compel the conclusion that ERISA now completely preempts state law community property claims to pension plan benefits.

As the following discussion will demonstrate, Petitioner's contentions lack merit. REA's amendments actually confirm the existence of community property rights in plan benefits in the divorce context. Further, REA's amendments do not even address, let alone repeal, the pre-REA law respecting the community property rights of a nonparticipant spouse in the testamentary context.

1. REA'S QDRO Provisions Do Not Preempt The Community Property Rights of A Predeceased Nonparticipant Spouse.

Despite the judicial consensus discussed above, Congress was concerned about the "divergence of opinion among courts as to whether ERISA preempts State community property laws insofar as they relate to the rights of a married couple to benefits under a pension plan." S. Rep. No. 98-575, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong.

& Ad. News at 2565 (footnote omitted).[9] The judicial debate that Congress wished to settle in REA centered on the divorce arena only – no debate over testamentary rights of nonparticipant spouses in community property states had yet emerged.

In crafting a legislative solution to this multi-faceted problem regarding ERISA plans in the divorce context, Congress created the "qualified domestic relations order" ("QDRO"). The QDRO was created to settle, on a prospective basis, the debate over ERISA rights in the divorce context only. There is nothing in REA's legislative history to suggest that Congress, in creating the QDRO, also intended to legislate away by inference community property rights in the death context. Indeed, the legislative history suggests just the opposite – that REA was not intended to "define or restrict the marital property interest in retirement benefits as determined under state law." (Statement of Representative Erlenborn, 130 Cong. Rec. H875 (daily ed. Aug. 9, 1984)).

As enacted in REA, the QDRO is a mandatory uniform device to enforce rights to ERISA plan benefits in a divorce context, whether those rights arise in a common law jurisdiction or a community property jurisdiction. To avoid any uncertainty over the ERISA preemption issue, Congress understandably inserted the QDRO as an express statutory exception both in ERISA's main preemption clause (see 29 U.S.C. § 1144(b)(7)) and in ERISA's anti-alienation provision (see 29 U.S.C. § 1056(d)(3)).

In *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit concluded that the QDRO provisions of REA preempt (and therefore defeat) a nonparticipant spouse's claim to her community property share of ERISA plan benefits in the death context. Essentially, the *Ablamis* majority concluded that the QDRO was intended by Congress to "fully occupy the field" of recognizing a nonparticipant spouse's community property claims to ERISA plan benefits. Since, according to the *Ablamis* majority, a probate order cannot fit within the statutory definition of a QDRO, the probate order is necessarily preempted.

The Fifth Circuit in the instant case rejected the Ninth Circuit's reasoning in *Ablamis*, on the ground that the Ninth Circuit's preemption analysis "places too much emphasis on a broad interpretation of the spendthrift provision." *Boggs v. Boggs*, 82 F. 3d 90, 98 (5th Cir. 1996).

The Section supports the Fifth Circuit's position and believes that the Ninth Circuit's *Ablamis* decision is flawed. *Ablamis* took a very limited statutory exception, carefully crafted to serve a particular purpose in a particular context, and stretched it far beyond Congress' stated intentions. Neither the legislative history of REA nor the precise statutory language added by REA supports the *Ablamis* majority's conclusion that Congress intended to fully occupy the field of community property rights in the death context when it created the QDRO.

As amended by REA, 29 U.S.C. § 1144(b)(7) provides that the main preemption clause

> shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title)....

Section 1056(d)(3), in turn, provides that ERISA's anti-alienation provisions

> shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that [the anti-alienation provision] shall not apply if the order is determined to be a qualified domestic relations order. (Emphasis added).

In defining a "qualified domestic relations order," Congress clearly stated

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[9] The "divergence" of judicial opinion that worried Congress seems of doubtful existence. As support for its statement, the Senate Report cited only two cases: the Ninth Circuit's 1980 decision in the *Stone* case, which rejected ERISA preemption, and the district court's opinion in *Francis v. United Technology Corp.*, 458 F.Supp 84 (N.D. Cal. 1978), which ruled in favor of ERISA preemption. *Stone* was decided two years after the district court's decision in *Francis*; since the *Francis* court is inferior to the *Stone* court, *Stone* effectively overruled *Francis* and eliminated any "divergence" of judicial opinion regarding ERISA preemption of community property laws.

that it includes a divorce decree which relates to marital property rights of a nonparticipant spouse under a state's community property law. See 29 U.S.C. § 1056(d)(3)(B)(ii). [10]

In other words, the drafters of REA added to ERISA a statement that first expressly subjected all domestic relations orders (and only domestic relations orders) [11] dealing with ERISA plan benefits to ERISA's anti-alienation provisions, and then carved out the QDRO exception. This approach reveals that Congress found it necessary to expressly declare that all such divorce decrees were preempted by ERISA's anti-alienation provisions. The only logical explanation for the explicit declaration is that, before REA, all divorce decrees (such as those in the *Campa* and *Stone* cases that confirm a nonparticipant spouse's community property rights) were not considered by the courts to have been preempted by the anti-alienation provisions.

It follows that, before REA, in light of the judicial and Congressional acceptance of community property rights in ERISA plan benefits, a probate order confirming a nonparticipant spouse's community property rights was likewise not preempted by ERISA's anti-alienation provisions.

REA, of course, affirmatively changed the prior law with respect

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[10] This statutory language regarding a qualified domestic relations order's "recognition" of rights to plan benefits based on a "community property law" itself reveals Congress' acceptance of the principle that ERISA does not preempt a state's community property laws. This forthright statutory acknowledgment that ERISA and community property rights may co-exist largely negates the arguments advanced in the U.S. Department of Labor's *amicus* brief, since those arguments presuppose that, for sake of national uniformity, ERISA (even pre-REA ERISA) necessarily preempts all community property rights of nonparticipant spouses.

[11] The *Ablamis* majority argued that REA's QDRO provisions preempt community property rights in the testamentary context because a "probate order" cannot fit within the definition of a QDRO. The *Ablamis* majority's analysis fails. It turned the QDRO statute on its head in reaching its preemption conclusion. A more careful reading of the statute reveals that a probate order does not fit within the definition of a "domestic relations order" which REA now says are preempted. Thus, probate orders fall outside the scope of REA's newly added preemption rule. Had Congress intended to preempt probate orders recognizing community property rights, Congress would have included the words "probate order" in the opening clause of section 1056(d)(3)(A).

to divorce decrees. By express statutory language, those decrees are now preempted (unless they qualify as a QDRO). REA was utterly silent with respect to probate orders. Accordingly, the prior law still applies to those orders -- the prior law which recognized that ERISA (including its anti-alienation provisions) does not preempt state law community property rights in the testamentary context.

It is entirely possible that Congress may decide to legislate in this context as well. For example, Congress may choose to enact into ERISA a "terminable interest rule" (discussed in Section 2 below), pursuant to which a predeceasing nonparticipant spouse's community property interest would automatically terminate at her death. Or Congress may borrow a page from REA and create a "qualified probate order" to deal with and enforce (on a uniform nationwide basis) these community property rights in the death context. Or Congress may take some other approach altogether, or take no action at all.

But that, quite simply, is the point. Under current law, probate orders that recognize community property rights of the predeceased nonparticipant spouse are not preempted by ERISA. Any change in that law is properly left to Congress.

2. REA's Annuity Provisions Are Not Complete Federal Substitutes For State Community Property Law Principles.

In addition to creating the QDRO, REA added a regime of mandatory survivor annuity benefits in ERISA-regulated retirement plans. The legislative history behind REA reveals that these annuity provisions were intended to enhance the rights of surviving nonparticipant spouses in both common law and community property jurisdictions. The REA additions were not intended to curtail any existing rights that nonparticipant spouses in community property jurisdictions already possessed under state law.

Indeed, in several respects the annuity provisions of REA mirror the fundamental community property recognition of "marriage as an

economic partnership, and the substantial contribution to that partnership of spouses who work both inside and outside the home." S. Rep. No. 98-575, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547. Nevertheless, as noted earlier, REA's legislative history reveals that REA was not intended to "define or restrict the marital property interest in retirement benefits as determined under state law." (Statement of Representative Erlenborn, 130 Cong. Rec. H875 (daily ed. Aug. 9, 1984.)

In other words, by creating greater security through mandatory survivor annuities for nonparticipant surviving spouses, including those in community property jurisdictions, Congress intended to supplement, not supplant, their existing community property rights in their spouses' pension benefits.

a. The Background To REA's Mandatory Survivor Annuity Provisions.

As originally enacted, ERISA Section 205 (29 U.S.C. § 1055) did not require survivor's benefits for nonparticipant spouses in all cases. "Qualified joint and survivor annuities" were an elective form of benefit for retiring participants. Pre-retirement death benefits were also limited.[12]

Before REA, participants were free to choose elective forms of benefit payments at retirement, such as a single-life annuity, lump sum or installment payment options.[13]

Before REA, spousal consent was not required when the participant selected among the different forms of payment at retirement. As a result, "most participants have in the past elected out of the joint and survivor's form at retirement in favor of a single-life or another

[12] See Bruce, *Pension Claims: Rights and Obligations* (BNA 1988), Ch. 6, p. 256.

[13] Id. at p. 258.

annuity form with higher immediate benefit payments."[14]

Finally, before REA, the preretirement survivor's coverage required under ERISA failed to cover many "early" deaths. Congress found that this failure resulted in "inequitable treatment of participants ... who die before the normal [or qualified early] retirement age under the plan... [because] the participant's spouse [could] be entitled to no survivor's benefits under the plan even though the participant had accrued significant vested benefits before death." S. Rep. 98-575, at 12, 98th Cong. 2d Sess. 1, *reprinted in* 1984 U.S. Code Cong. & Ad. News 2547, at 2557.

In summary, before REA a participant could elect without spousal consent a payment option which could severely limit or eliminate a spouse's continued benefits at the participant's death. It was against this factual and legal backdrop that Congress enacted REA to better protect the nonparticipant spouse.

b. The Lifetime and Testamentary Community Property Rights Of A Nonparticipant Spouse In Retirement Benefits.

In analyzing the effect of the REA amendments, it is critical to keep in mind that, under California community property laws, a married participant's accrued benefits in an ERISA-regulated retirement plan constitute the community property of both spouses, concurrently owned one-half by each spouse. *In re Marriage of Brown*, 15 Cal.3d 838, 126 Cal. Rptr. 633, (1976); *In re Marriage of Ames*, 59 Cal.App.3d 234 ,130 Cal. Rptr. 435 (1976). As noted earlier, ERISA-regulated retirement benefits are simply a form of deferred compensation. Regardless of the form or manner in which these benefits are paid during the participant spouse's lifetime (i.e., single-life annuity, joint and survivor annuity, or lump sum), each plan payment constitutes

[14] Id. at p. 270.

a community property asset of the parties, identical to any other type of employment earnings.

As discussed earlier, before REA the courts consistently recognized the community property character of ERISA-regulated retirement benefits, although the issue most often arose in the divorce context. In *Campa, Stone* and the other cases discussed earlier, the courts upheld the community property rights of the nonparticipant spouse in ERISA plan benefits in the divorce context. REA did not eliminate the community property rights of the nonparticipant spouse upon divorce; it simply created the uniform QDRO device to enforce them (along with the rights to ERISA plan benefits of divorcing spouses in common law jurisdictions).

The only reported pre-REA case addressing ERISA-regulated retirement benefits in the death context likewise confirmed the community property rights of the nonparticipant spouse. In *Employee Savings Plan of Mobil Oil Corp. v. Geer, supra,* 535 F.Supp. 1052 (S.D.N.Y. 1982), the court addressed an issue arising under Texas community property law. In *Geer,* the deceased employee designated his wife as beneficiary for 50% of his plan benefits and his two children as beneficiaries for the other 50%. The wife argued that, under Texas community property law, she already owned one-half of the retirement funds and her husband could only properly dispose of the remaining half. The district court agreed, awarding her 75% of the funds and 12.5% to each of the two children.

The *Geer* court found that ERISA did not preempt the community property principles of Texas laws of succession and inheritance. Specifically, the court used the *Stone* "tangential relation" and the "remote touching" test as set forth in *American Telephone and Telegraph Company v. Merry*, 592 F.2d 118 (2nd Cir. 1979), and found that "[a]lthough this state law has an impact on the distribution of assets.... this impact [is] the kind of remote touching that the *Merry* court excluded from the meaning of 'relating to.'" Id. at 1054.

The *Geer* court concluded:

> ". . . [T]he question here is whether Congress intended complete cancellation of the state's traditional property rights ... [T]he Court finds that Congress did not intend to preempt community property laws to the extent that they require the distribution claimed in this case.
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> Although the Act provides a method for the participant to designate a beneficiary, this procedure appears to be another provision for the protection of the employee in his relations with his employer and not a federal decision to upset the balance of spousal rights protected by state law. Id. at 1055 (emphasis added).

Before the enactment of REA, the testamentary rights of the nonparticipant spouse to pension benefits in California was in a state of flux, due to an ongoing struggle with the so-called "terminable interest rule." The terminable interest rule was first created by the California Supreme Court in 1963.[15]

The terminable interest rule was finally legislatively abolished in 1986, two years after Congress enacted REA. The California Legislature enacted former California Civil Code section 4800.8 (now California

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[15] The California Supreme Court created the terminable interest rule in *Benson v. City of Los Angeles,* 60 Cal.2d 355, 33 Cal.Rptr. 257, (1963), and expanded it nine years later in *Waite v. Waite,* 6 Cal.3d 461, 99 Cal.Rptr. 325, (1972). One of the aspects of this judicially created principle was that the nonparticipant's community property rights in the participant's retirement benefits (whether privately or publicly funded) terminated at the nonparticipant's death. Culhane, *Toward Pension Equality: A Reexamination of California's Terminable Interest Doctrine,* 14 Sw. U.L. Rev. 613, 616 (1984) reprinted as *Toward Pension Equality: A 'Death Blow" to California's Terminable Interest Doctrine,* 12 Comm. Prop. J. 199 (1985).

Both before and during the time Congress was considering the REA amendments, the California terminable interest rule was coming under increased attack. See *In Re Marriage of Peterson,* 41 Cal.App.3d 642, 15 Cal.Rptr. 184, (1974). In *Chirmside v. Board of Administration,* 143 Cal.App.3d 205, 191 Cal.Rptr. 605, (1983), the court refused to apply the rule to community property contributions in a fully vested public retirement plan. In *Bowman v. Bowman,* 171 Cal.App.3d 148, 217 Cal.Rptr. 174, (1985), the court declined to apply it in the context of a private pension plan. See also *Western Conference of Teamsters Pension Trust Fund v. Jones,* 646 F.Supp. 228, 232-33 (N.D. Cal. 1986).

Family Code section 2610) which specifically dealt with the rule in a divorce context. The legislative history nevertheless reveals, and subsequent case law confirms, that the rule was also abolished in the death context. See *Estate of MacDonald*, 51 Cal.3d 262, 272 Cal.Rptr. 153, 794 P.2d 911 (Cal. 1990).[16]

In short, during the time that Congress was formulating its legislative solutions in REA to protect the surviving nonparticipant spouse, the rights of the predeceased nonparticipant spouse in California were the subject of a game of judicial tug-of-war. The intense struggle being played out in the California courts escaped the Congress' attention in REA; the aftermath of that struggle -- the abolition of the terminable interest rule and the vindication of the nonparticipant spouse's testamentary rights over community property pension benefits -- faced the Ninth Circuit in *Ablamis*. Unfortunately, that court reached the wrong conclusion. The opportunity to properly interpret what REA did and did not do is now before the Court.

c. REA's Mandatory Annuity And Spousal Consent Provisions.

The REA amendments to ERISA were designed to address Congress' concern over ERISA's failure to assure death benefits for surviving nonparticipant spouses. REA dealt with this failure by addressing two specific circumstances: (1) the participant's post-retirement death, and (2) the participant's pre-retirement death. Notably, nowhere in the legislative history of REA nor in the amended statutory language does Congress even refer to, let alone specifically deal with,

[16] Both before and after REA's enactment, two supreme courts from other community property jurisdictions expressly declined to adopt California's terminable interest rule and upheld the inheritability of a deceased nonparticipant spouse's community property share of pension benefits. See *Farver v. Department of Retirement Systems*, 97 Wash.2d 344, 644 P.2d 1149 (1982) (dealing with state-funded benefits); *Allard v. Frech*, 31 T. Sup. J. 371, 754 S.W.2d 111 (Texas 1988) (dealing with ERISA plan benefits).

the rights of a predeceasing nonparticipant spouse in a community property jurisdiction.

For post-retirement deaths of participants, REA reinvigorated ERISA's original mandate that benefits be provided in the qualified joint and survivor annuity form, by requiring "spousal consent when[ever] a participant elects not to take a survivor benefit." S. Rep. No. 98-575, at 12 (1984), *reprinted in* 1984 U.S. G.C.A.N. News 2547, 2558. [17]

Regarding pre-retirement deaths of participants, the survivor annuity rules created by REA are complex. Generally, under the REA amendments, a preretirement survivor annuity is now required under all pension plans whenever a deceased participant has a nonforfeitable right to benefits. A plan may no longer forego such survivor benefits.

The rules regarding the amount of the "qualified preretirement survivor annuity" created by REA are even more complex. They differ depending on whether the plan is a defined benefit plan or a defined contribution plan. See 26 C.F.R. § 1.401(a)-20 (Q&A-18 (QPSA for defined benefit plan) and Q&A-20 (QPSA for defined contribution plan)).

Although REA in many respects made the surviving nonparticipant spouse the mandatory beneficiary of the participant's pension benefits, certain exceptions remained.

[17] As explained in one treatise:

> "With the spouse's consent, a participant may still elect to take benefits in a single-life form to avoid an actuarial reduction, or he or she may elect not to take preretirement coverage to avoid a small actuarial charge, but presumably fewer will do so with the new spousal consent requirements."

Bruce, *Pension Claims: Rights And Obligations*, supra at p. 270.

REA's qualified joint and survivor annuity mandate does have one exception. 29 U.S.C. § 1055, as amended, provides that a joint and survivor annuity need not be offered under a profit-sharing or stock bonus plan if the plan provides that any undistributed nonforfeitable account balance at death will be paid to the participant's spouse (unless, again, the spouse consents to a different beneficiary). ERISA § 205(b)(1)(C)(i), as amended (29 U.S.C. § 1055(b)(1)(C)(i)).

First, for defined benefit plans, REA's survivor annuity requirements

> apply only to benefits in which a participant was vested immediately prior to death. They do not apply to benefits to which a participant's beneficiary becomes entitled by reason of death or to the proceeds of a life insurance contract to the extent such proceeds exceed the present value of the participant's nonforfeitable benefits that existed immediately prior to death.

26 C.F.R. § 1.401(a)-20 (Q&A-12(a)) (emphasis added).

Second, for certain defined contribution plans, REA's survivor annuity requirements only apply to 50% of the nonforfeitable account balance of the participant as of the date of the participant's death. 26 C.F.R. § 1.401(a)-20 (Q&A-20).

In short, even after REA, a participant retains testamentary control over a certain portion of the death benefits available under his or her plan. In post-REA cases arising from common law jurisdictions, courts have recognized and upheld the participant's right to exercise this testamentary control over the non-REA-affected death benefits. See *Art Builders Profit Sharing Plan v. Bosely*, 649 F.Supp. 848, (D. Md. 1986); *Naddeo v. Officers and Employees Pension Plan*, 637 F.Supp. 82 (E.D. Pa. 1986). Although *Geer* predated REA, its holding would likewise suggest that, in a community property jurisdiction, the participant's testamentary control over the non-REA-affected death benefits is limited to his or her one-half community property interest in those benefits. The balance belongs to the surviving spouse, either as owner with respect to the other half of the non-REA-affected benefits, or as the REA-mandated beneficiary with respect to the REA-affected benefits.

d. The Ninth Circuit's Insertion, Through Judicial Legislation, Of The Terminable Interest Rule Into ERISA.

In *Ablamis v. Roper, supra*, 937 F.2d 1450 (9th Cir. 1991), the Ninth Circuit Court, based almost exclusively on an analysis of ERISA's anti-alienation provision and REA's QDRO exception to that provision, concluded that Congress intended to create its own "terminable interest rule" when it enacted REA. The *Ablamis* court also suggested that REA's survivor annuity provisions were intended by Congress to limit the nonparticipant spouse's right to receive (or control) her community property share of the plan benefits. Id. at 1453-54.

The Section submits that the Ninth Circuit's *Ablamis* decision is flawed. Simply put, the QDRO provisions added by REA --which the *Ablamis* court itself acknowledged deal only with the divorce context -- cannot be fairly read as Congress' considered enactment into ERISA of the much-criticized terminable interest rule in the death context.

REA's survivor annuity provisions likewise provide no basis for a federal terminable interest rule affecting the nonparticipant's preexisting community property rights. REA's survivor annuity provisions concern themselves only with the participant's post-retirement death and pre-retirement death. These provisions simply do not address in any fashion the community property ownership issues (including testamentary control issues) which arise if the nonparticipant spouse in a community property jurisdiction dies first. Properly analyzed, the legislative history behind REA evidences that Congress, at best, intended simply to enhance the rights of surviving nonparticipant spouses (in both common law and community property jurisdictions) and, at worst, failed to consider, let alone address, issues arising from the existing testamentary rights of the predeceased spouse in community property jurisdictions.

The *Ablamis* majority, apparently uncomfortable with the perceived gap in the statutory scheme resulting from the REA amendments to ERISA, took it upon itself to fill that gap by judicially

legislating the terminable interest rule into ERISA. The *Ablamis* majority impliedly admits that it has judicially legislated what it perceived to be a fair solution to fill the gap left by Congress' REA amendments, when it states:

> Were the statute to be amended to provide equal benefits to the employee and non-employee spouse, Congress would have to consider two alternatives: permitting both spouses to bequeath a portion of the pension benefits, and prohibiting both spouses from doing so - at least without the consent of the other. Were Congress to adhere to its objective of seeking to ensure the financial well-being of retired employees and their spouses, it would in all likelihood choose the latter option.

Id. at 1457 n. 12 (Emphasis added).[18]

As the dissent in *Ablamis* pointed out, "[t]he majority seems to miss the question to be answered." *Id.* at 1466 n. 2 (Fletcher, Circuit Judge, dissenting). The question is not what Congress would do if it addressed the issue (which it has not), but whether ERISA, as amended by REA, "positively requires" by "direct enactment" the federal

[18] The majority opinion in *Ablamis* was presaged by the dissenting opinion in *Allard v. Frech, supra*, 754 S.W.2d at 116-20 (Spears, Justice, dissenting). The *Allard* dissent also argued for ERISA preemption to defeat the claims of the nonparticipant spouse's heirs. In contrast to the quiet approach of the *Ablamis* majority, however, the *Allard* dissent openly championed the judicial enactment of the terminable interest rule in ERISA to combat "the unfairness inherent in divesting an employee of hard-earned retirement benefits and diverting these benefits to healthy young adults capable of self support." 754 S.W.2d at 118. While the Section can appreciate these concerns over perceived inequities, the Section notes that there can also be "patent inequity" in stripping the nonparticipant spouse of her share of a valuable asset which she may desperately wish to leave to her dependents. (It must also be noted that, even without a terminable interest rule, the nonparticipant spouse is free to bequeath her share of the pension benefits to the participant, if that is her wish.) In any event, this debate simply underscores that the legislature, not the courts, is the proper forum for addressing this issue, since all the opposing viewpoints can be aired and considered in crafting the appropriate resolution.

preemption of the predeceased nonparticipant spouse's existing community property rights. The *Ablamis* dissent likewise correctly concludes that these fundamental prerequisites for federal preemption of state law marital property rights are missing from the REA amendments, and that REA's survivor annuity provisions "certainly cannot be read as creating the testamentary disenfranchisement of a predeceasing spouse." Id.

A decision either affirming or reversing the *Boggs* decision may result in some perceived inequities, given the somewhat flawed and imperfect statutory scheme resulting from the REA amendments to ERISA.[19] Nevertheless, the Court should not insert its own legislative judgment into the apparent gap in ERISA's complex and comprehensive regulatory scheme. Based on the statutes as enacted and well-established judicial precedent, the existing testamentary rights of a predeceased nonparticipant spouse afforded under state community property law in ERISA-regulated retirement benefits should be recognized and upheld. Any other resolution – to correct, for example, any perceived imbalances in the spouses' lifetime or testamentary pension rights under state community property law – must be left to Congress.

D. Post-REA Legislation Reflects Congress' Awareness That A Predeceased Nonparticipant Spouse Has Testamentary Ownership And Control Over Her Share Of The Participant's Pension Benefits.

Internal Revenue Code (IRC) § 2039(c), 26 U.S.C. § 2039(c) provided an express federal estate tax exclusion for the community property interest of a nonparticipant spouse in qualified pension plan benefits. The Tax Reform Act of 1986 (Pub. L. No. 99-514, section 1852(e)) repealed IRC § 2039(c). As a result of that repeal, a

[19] A chart comparing the different lifetime and post-death distribution schemes that result from the Ninth Circuit's *Ablamis* approach and the Fifth Circuit's *Boggs* approach is set forth in the Appendix to this *amicus curiae* brief.

predeceased nonparticipant spouse's gross taxable estate now includes the value of any community property interest that he or she has in the participant's qualified plan. The Senate Finance Committee Report for the bill stated:

> Under the bill, the special community property rules applicable to qualified plans for purposes of the estate and gift tax provisions are repealed. However, the bill clarifies that if a transfer is made to an employee spouse by a nonemployee spouse in a community property state, the amount transferred is eligible for the unlimited marital deduction. (Emphasis added).

S. Rep. No. 99-313.

Although Congress did not enact the promised clarification that the amount transferred by the nonemployee spouse to the employee spouse will qualify for the marital deduction, the Report is significant for several reasons. First, the Report states unambiguously that a nonemployee spouse in a community property state has a taxable property interest which is transferable at death. Second, it acknowledges that a transfer could be made by the nonparticipant spouse to a person other than the participant spouse.

In short, Congress' action in repealing the IRC § 2039(c) exclusion in 1986, two years after REA's enactment, clearly evidences Congress' awareness of a nonparticipant spouse's testamentary ownership and control over his or her community property share of pension benefits. This legislative action makes no sense if the REA amendments to ERISA had earlier eliminated those very same testamentary rights.

II. THERE IS NO FEDERAL PREEMPTION OF COMMUNITY PROPERTY INTERESTS IN INDIVIDUAL RETIREMENT ACCOUNTS

An individual retirement account ("IRA") is a self-settled trust governed by section 408 of the Internal Revenue Code, 26 U.S.C. § 408. An IRA is not an employee benefit plan subject to the preemption

provisions applicable to Titles I and IV of ERISA. See Department of Labor Reg. § 2510.3-3(b). An IRA is also not subject to the anti-alienation provisions applicable to ERISA plans. See 29 U.S.C. § 1051(b) [excepting IRAs from, inter alia, the anti-alienation provisions in section 1056.][20]

Recognizing that ERISA provides no basis for preemption, Petitioner nevertheless argues for federal preemption of community property rights in IRAs based on IRC section 408(g), which reads: "This section [408] shall be applied without regard to any community property laws." Petitioner's contention lacks merit and must be rejected.

The purpose of subsection (g) of IRC section 408 is quite straightforward. Under IRC section 408, a taxpayer is entitled to an income tax deduction, based on his or her "earned income," for deposits into an IRA. To ensure uniformity in the calculation of those deductions, subsection (g) makes it clear that the taxable income of the wage-earner in a community property jurisdiction is not divided in half for purposes of computing his or her permissible IRA deduction.

Aside from this straightforward meaning and purpose of subsection (g), Petitioner's contention that this modest provision in the Internal Revenue Code was intended to preempt state community property rights in IRAs has absolutely no support in any legislative history, administrative rulings, or case law. Indeed, all such authority clearly recognizes community property rights in IRAs, including those rights in the death context. See *Estate Of MacDonald*, *supra*, 51 Cal. 3d 262, 272 Cal. Rptr. 153 (1990); *Estate of Mundell*, 857 P. 2d 631, 124 Idaho 152 (1993).

The Internal Revenue Service has itself acknowledged that subsection (g) of IRC section 408 does not preempt community property

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[20] Section 408(e)(4) of the Internal Revenue Code (26 U.S.C. § 408(e)(4)) expressly permits an IRA to be used as security for a loan.

rights in IRAs. In Private Letter Ruling 8040101,[21] the Service upheld the testamentary transfer of a wife's community property interest in her husband's IRA. The Service stated:

> As a general rule, the death of one spouse in a community property state has the same effect on the community as a divorce decree. Upon either death or divorce, the community is terminated and a division of the community property usually occurs. It would follow that a similar result should be reached whether the community is ended by divorce or death.
>
> Because there is no specific language on what effect Congress intended section 408(g) to have, and because of the general rule of statutory construction which provides that federal statutes are construed as to not preempt State law unless that was the clear and manifest intent of Congress, we conclude that section 408(g) does not abrogate any substantive rights under State law.

There is simply no support for Petitioner's argument calling for federal preemption of state law community property rights in IRAs. Indeed, given the self-funded nature of IRAs which must be in the employed spouse's name, a finding of federal preemption would utterly destroy the non-employed spouse's rightful community property claim to the money deposited in the employed spouse's IRA. That result would make absolutely no sense as a matter of law or policy.

Given the precise language and straightforward purpose of subsection (g) of IRC section 408 and the existing authorities, the Court should reject Petitioner's argument and rule that there is no federal preemption of state law community property interests in IRAs.

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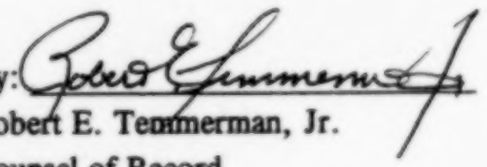
[21] Internal Revenue Code section 6110(j)(3) [26 U.S.C. § 6110(j)(3)] provides that private letter rulings may not be used as precedent. However, this Court has used such rulings as evidence of the Service's position. See *Rowan Companies, Inc. v. U.S.*, 452 U.S. 247 (1981). It is for that limited purpose that the Section discusses Priv. Ltr. Rul. 8040101.

CONCLUSION

State community property law recognizes that a deceased nonparticipant spouse, as one-half of an economic partnership with her spouse, has a current and equal ownership interest in her community property share of retirement plan benefits. The recognition of this ownership interest is fundamentally important, especially in this day and age where significant family wealth is concentrated in such plans. Although Congress may choose to impose its own legislative judgment in the arena of community property rights in this testamentary context, it has not yet done so. For all of the foregoing reasons, the Section urges the Court to rule that ERISA, as amended by REA, does not preempt state community property law principles and does not deprive a nonparticipant spouse of testamentary control over her community property share of the benefits.

Dated: December 30, 1996

Respectfully Submitted,
ESTATE PLANNING, TRUST AND PROBATE LAW SECTION OF THE STATE BAR OF CALIFORNIA

By: 
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APPENDIX

COMPARISON OF LIFETIME AND POST-DEATH DISTRIBUTION SCHEMES UNDER *ABLAMIS* AND *BOGGS* ASSUMING NO WAIVER OF QPSA AND QJSA

Legend

P	=	Participant spouse
NPS	=	Nonparticipant spouse
QPSA	=	Qualified preretirement survivor annuity
QJSA	=	Qualified joint and survivor annuity
DOD	=	Date of death
CP	=	Community property

	ABLAMIS		BOGGS	
Pre-Retirement	**Defined Benefit and Money Purchase Plan**	**Profit-Sharing and Stock Bonus Plan**	**Defined Benefit and Money Purchase Plan**	**Profit-Sharing and Stock Bonus Plan**
P dies first, before P has retired.	NPS receives 100% of vested plan benefits thru QPSA -- amount and timing of receipt depends on whether P died before or after reaching earliest retirement age in the plan. P can designate (without NPS's consent) beneficiary for vested plan benefits (if any) that exceed the value of the QPSA. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	NPS receives 50% of vested account balance thru QPSA (or 100% of vested account balance if plan so provides, in lieu of QPSA). P can designate (without NPS's consent) the beneficiary for other vested account balance.	NPS receives 100% of vested plan benefits thru QPSA -- amount and timing of receipt depends on whether P died before or after reaching earliest retirement age in the plan. P and NPS each own and control 50% of any other benefits provided by plan.	NPS receives 75% of vested account balance -- NPS's 50% CP share of account balance and 25% of account balance thru QPSA (50% x P's 50% CP share of account balance). P can designate (without NPS's consent) the beneficiary for other 25% of account balance.

Pre-Retirement	ABLAMIS		BOGGS	
	Defined Benefit and Money Purchase Plan	Profit-Sharing and Stock Bonus Plan	Defined Benefit and Money Purchase Pension Plan	Profit-Sharing and Stock-Bonus Plan
NPS dies first, before P has retired	P owns 100% of all plan benefits and can exercise complete lifetime and testamentary control over them.	P owns 100% of account balance and can exercise complete lifetime and testamentary control over it.	NPS's estate owns and controls 50% of all accrued benefits as of NPS's DOD. P owns and controls balance of accrued benefits (including 100% of accruals after NPS's death).	NPS's estate owns and controls 50% of account balance as of NPS's DOD. P owns and controls the balance of P's account (including 100% of accruals after NPS's DOD).

Post-Retirement	ABLAMIS		BOGGS	
	Defined Benefit and Money Purchase Plan	Profit-Sharing and Stock Bonus Plan	Defined Benefit and Money Purchase Pension Plan	Profit-Sharing and Stock-Bonus Plan
P dies first, after P has retired.	NPS receives 100% of vested plan benefits thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	NPS receives 100% of vested account balance thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement.	NPS receives 100% of vested plan benefits thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement. P and NPS each own and control 50% of any other death benefits provided by plan.	NPS receives 100% of vested account balance thru QJSA -- survivor annuity is 50%-100% of joint annuity, depending on election made by P at retirement.
NPS dies first, after P has retired	P owns and controls 100% of QJSA joint annuity payment. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	P owns and control 100% of QJSA joint annuity payment. P can designate (without NPS's consent) beneficiary for any other death benefits provided by plan (e.g. excess life insurance proceeds).	P owns and controls 50% of QJSA joint annuity payment and NPS's estate owns and controls 50% of QJSA joint annuity payment.	P owns and control 50% of QJSA joint annuity payment and NPS's estate owns and controls 50% of QJSA joint annuity payment.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of December, 1996, three (3) true and correct copies of the foregoing **Motion for Leave to File *Amicus Curiae* Brief in Support of Respondents** and **Brief of the Estate Planning, Trust and Probate Law Section of the State Bar of California as *Amicus Curiae* in Support of Respondents** were transmitted by UPS Next Day Air to each counsel at the addresses set forth below:

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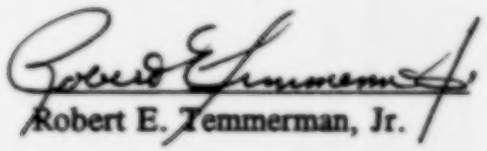

Robert E. Temmerman, Jr.

Supreme Court, U.S.
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No. 96-79

In the Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA JEAN DALE BOGGS, PETITIONER

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID B. BOGGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT AND SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ARGUMENT

Pursuant to Rules 25.5 and 25.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States as *amicus curiae*, requests leave to file a supplemental brief in this case. This supplemental brief is submitted in light of questions from the Court at oral argument as to whether, under our interpretation of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), ERISA might effect an unconstitutional taking of property without just compensation. That question was not addressed by any of the parties in their briefs on the merits in this case. We respectfully suggest that supplemen-

tal briefing on the taking issue could assist the Court in its consideration of the question presented.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-79

SANDRA JEAN DALE BOGGS, PETITIONER

v.

THOMAS F. BOGGS, HARRY M. BOGGS AND DAVID B. BOGGS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

This supplemental brief is submitted in light of questions at oral argument as to whether, under our interpretation of the Employment Retirement Income Security Act of 1974 (ERISA) in this case, ERISA might effect an unconstitutional taking of property without just compensation.

1. It is our position that state community property law "relate[s] to" a plan, and therefore is "supersede[d]" by ERISA, 29 U.S.C. 1144(a), to the extent state law purports to create a property interest in assets held by an ERISA plan in trust for the exclusive benefit of the participant and of beneficiaries designated by the partici-

pant, the plan, or ERISA itself.[1] ERISA provides for state community property law to enter into the ownership of plan assets or the payment of plan benefits only pursuant to a qualified domestic relations order (QDRO). See 29 U.S.C. 1056(d)(3), 1144(b)(7). Qualification of a domestic relations order by the plan entitles the ex-spouse or child for whose benefit the order was entered (the "alternate payee") to payments from the plan in accordance with the QDRO as a matter of federal law, not state law of its force. See 29 U.S.C. 1056(d)(3)(J).

At oral argument, it was suggested that, if ERISA superseded state community property laws that would otherwise have granted a nonparticipant spouse an interest in a participant's pension plan, then ERISA might have effected a taking of Dorothy Boggs' interest in Isaac Boggs' pension plans. We do not agree.

2. As an initial matter, the taking question could arise only with respect to assets held by the plan for Mr. Boggs as of ERISA's effective date, September 2, 1974. At least as of that date, ERISA "supersede[d]" "any and all State laws insofar as they may now or hereafter relate to" a plan, 29 U.S.C. 1144(a), and thus prevented the subsequent creation of any state-law property interest in plans in the first place. Accordingly, there is no basis for concern that, after ERISA's enactment, Dorothy Boggs might have obtained a state-law interest in the plan that was later "taken" by ERISA. Moreover, after that enactment, state law was superseded with respect to both defined benefit plans and defined contribution plans, such as Mr. Boggs' stock and savings plans. See 29 U.S.C.

[1] We use the term "participant" here in its meaning as given in ERISA, "any employee or former employee * * * who is or may become eligible to receive a benefit of any type from an employee benefit plan * * * or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. 1002(7). In this case, Isaac Boggs was the participant, and Dorothy Boggs, before her death, was a nonparticipant spouse.

1055(a), (b)(1)(A) and (b)(1)(C)(i) (providing for joint and survivor annuity payments from both defined benefit and defined contribution plans).

3. a. No taking problem arises with respect to assets in Mr. Boggs' plans prior to enactment of ERISA either. Pension plans were established over the years in an area with the inherent potential for regulation, state or federal.[2] No taking arose from the adoption of comprehensive federal regulation for the benefit of participants and their spouses, even though it might have altered prior expectations about the manner in which benefits would be paid out. See *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 646 (1993); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 226-227 (1986); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). In this case, for example, Mr. Boggs had no property right protected by the Fifth Amendment to prevent the adoption of measures (such as ERISA) requiring that his employer's plan provide new safeguards (such as a survivor's annuity) for his wife. Because any interest Dorothy Boggs had in Mr. Boggs' plans before 1974 was derivative of her husband's interest, she also had no property right to prevent such regulation.

b. The circumstances of this case also make clear that no taking of property occurred upon the enactment of ERISA in 1974. We assume that, under Louisiana law, Dorothy Boggs had a community property interest in Isaac Boggs' pre-ERISA pension plans that could have been passed to her heirs. Nonetheless, there was no "taking" of such a property interest, even if ERISA prevented her from bequeathing to her children any

[2] See, *e.g.*, Welfare and Pension Plans Disclosure Act, Pub. L. No. 85-836, 72 Stat. 997 (1958); 29 U.S.C. 301-309 (1964); Employee Benefits Comm., American Bar Ass'n, *Employee Benefits Law* 1-5 (1991) (pre-ERISA history of pension regulation).

interest in Isaac Boggs' pension that she might have possessed at her death.

Here, Dorothy Boggs never exercised any *right* to make a testamentary transfer to respondents of her interest in her husband's pension plans. Respondents succeeded to her interest by operation of Louisiana's forced heirship law, and her will bequeathed to them nothing more than the interest that state law gave them. Dorothy Boggs' will, in fact, manifested an intent to bequeath to her husband outright the maximum amount "permitted under the law."[3] Thus, if Louisiana had amended its succession law before Dorothy Boggs' death to abolish forced heirship (as Louisiana in fact did after her death),[4] the terms of her will would have effectively bequeathed to Isaac Boggs outright her entire community property interest in his pension plans. Rather than taking from Dorothy Boggs a desired ability to pass her interest to her children, therefore, ERISA eliminated a state-law obstacle (the forced heirship law) that limited

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[3] Dorothy Boggs' will (Stip. Doc. C) stated:

> I, DOROTHY McDONALD BOGGS, make this last will and testament, revoking all others.
>
> I give and bequeath the maximum permitted under the law to my beloved husband, Isaac E. Boggs, Jr., together with the lifetime usufruct of the balance.
>
> I name and appoint my husband, Isaac E. Boggs, Jr., as the executor of my estate with seizin and without bond.
>
> IN WITNESS THEREOF, I have signed this my last will in the presence of the witnesses hereinafter named and undersigned.

[4] Louisiana has recently abolished forced heirship except for children under 24 years of age and certain disabled dependents. K.V. Lorio, *Forced Heirship: The Citadel Has Fallen—Or Has It?*, 44 La. B.J. 16 (1996); La. Const. Art. XII, § 5; 1996 La. Acts No. 77; 1995 La. Acts No. 1180.

Dorothy Boggs' ability to pass her interest to her husband.[5]

As a practical matter, the effect of ERISA was to provide that, after Dorothy Boggs' death, her interest in Isaac Boggs' plans was to be left outright to her husband rather than partly to her children (subject to her husband's lifetime use). The situation is the same as if Louisiana had changed its law during Dorothy Boggs' lifetime to provide that, after the death of one spouse, that spouse's community property interest shall pass to the surviving spouse (the "terminable interest rule").[6] Such a change in state law would surely not have amounted to a "taking." As the Court has observed, "rules of descent [are] subject to change by the law-making power as to any [property] not already passed to the heir by the death of the owner." *Jefferson* v. *Fink*, 247 U.S. 288, 294 (1918);

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[5] In general, the change effected by ERISA also ensures significant tax benefits for the estates of nonparticipant spouses. If a nonparticipant spouse had a state-law community property interest in the participant's pension plan that was not superseded by ERISA, then, if the nonparticipant spouse died first, her interest in the participant's plan would become includible in her gross estate for federal estate tax purposes. See 26 U.S.C. 2031(a); *Allard* v. *Frech*, 754 S.W.2d 111, 114 (Tex. 1988) (under Texas law, one half of spouse's retirement benefits earned during marriage are includible in decedent's estate), cert. denied, 488 U.S. 1006 (1989); but cf. *Hoppe* v. *Godeke*, 774 S.W.2d 368, 371 & n.1 (Tex. Ct. App. 1989) (noting that *Allard* majority did not reach issue of preemption of state law). And to the extent that the nonparticipant spouse might be required by forced heirship law to bequeath part of her interest to her children, she would not be eligible for the estate tax marital deduction (see 26 U.S.C. 2056(a)). Because ERISA effectively provides that the entire pension plan shall pass, after the nonparticipant spouse's death, to the participant, it eliminates potentially significant estate tax liability for the estate of the nonparticipant spouse.

[6] Texas has recently amended its community property law to adopt the "terminable interest rule" for community property interests in public pension plans. See *Kunin* v. *Feofanov*, 69 F.3d 59 (5th Cir. 1995).

see also *Randall* v. *Kreiger*, 90 U.S. (23 Wall.) 137, 147 (1875); *Mager* v. *Grima*, 49 U.S. (8 How.) 490, 493 (1850). The Court has also stressed that "no legal principle" prevents a State from "taking away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good." *United States* v. *Perkins*, 163 U.S. 625, 628 (1896). Sovereigns may, therefore, substantially alter or restrict rules governing descent and disposition of property, at least if they provide an opportunity for a decedent to have his or her property pass at death to some member of the immediate family, such as a spouse or children.

In *Hodel* v. *Irving*, 481 U.S. 704 (1987), the Court "reaffirm[ed] the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Id.* at 717. The Court held there that the Indian Land Consolidation Act (ILCA) had taken a property right because the Act's escheat provision "amount[ed] to virtually the abrogation of the right to pass on a certain type of property * * * to one's heirs." *Id.* at 716. See also *id.* at 717 ("a *total* abrogation of these rights cannot be upheld"); *Babbitt* v. *Youpee*, No. 95-1595 (Jan. 21, 1997), slip op. 10 (noting that amended version of ILCA effected a taking because it "severely restrict[ed] the right of an individual to direct the descent of his property").[7] But

[7] The Court in *Youpee* noted that the amended ILCA allowed a decedent "to leave an interest only to a current owner in the same parcel," which was unlikely to include "lineal descendants." Slip op. 10. *Youpee* did not involve a situation where the property interest would pass by operation of law to the participant's *spouse*—a crucial point distinguishing that case from this one. Even though ERISA prevented Dorothy Boggs from bequeathing her community property interest in Isaac Boggs' pension plan to her lineal descendants, it did not transfer

whereas a law that "abrogat[es]" or "severely restricts" the ability to pass property to members of the immediate family may be subject to challenge as a taking, *Hodel* and *Youpee* did not suggest that a law that directs transfers on death through conventional channels—to a spouse, or to children—is anything other than a permissible regulation of the law of descent, rather than a taking of property.[8]

The hypothetical change in Louisiana law we have discussed above, putting in place the terminable interest rule and thus requiring post-death transfers of property to a spouse rather than a child, would not amount to a taking of property. Such a law, ensuring that property remained within the control of the family during at least the surviving spouse's lifetime, would be entirely consistent with conventional estate-planning principles and testamentary transfers. But if such a hypothetical state law could not be assailed as a taking of property without just compensation, then neither can ERISA's preemption provision, which effectively requires that the participant, rather than someone else, obtain the entire property right in any pension plans after the nonparticipant spouse's death.

4. a. We assume further that, under pre-ERISA state law, Dorothy Boggs would have had a community property interest in any *proceeds* of the pension plan that were received by Isaac Boggs after his retirement—but only if she were still alive, and if the community still existed, when he retired and began to enjoy those proceeds.

that interest to a stranger, a distant relative, or the government. Rather, it passed that interest to her spouse, consistent with her will and with conventional estate-planning principles. See note 5, *supra*.

[8] Thus, if a State today enacted into law a modified form of forced heirship for children (such as Louisiana long had in place), and thus prevented a decedent from bequeathing all of her estate to her spouse outright, it would not be subject to challenge on the ground that it had taken a property interest protected by the Constitution.

By its very nature, Dorothy Boggs' right to realize an interest in such payments was contingent upon her survival until the payments became due under the terms of the plans. But there never were any payments subject to that contingent interest, for Dorothy Boggs died before Isaac Boggs received any payments under the plans to which a community property interest would have attached.

Contingencies of that kind are commonplace. They form the cornerstones of such familiar programs as the Old Age, Survivors, and Disability Insurance Program under the Social Security Act. The loss of future benefits under Isaac Boggs' plans that Dorothy Boggs' estate suffered when she died before plan benefits became payable should not, therefore, be seen as a taking of her rights. It was, rather, a termination of those rights under the terms of the plans governing them.

b. Furthermore, ERISA provided nonparticipant spouses with substantial benefits in return for any possible loss of the community property interest in the participant's benefits. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 (1987) ("reciprocity of advantage" defeats a claim of a taking). Most importantly, ERISA provided participants and their beneficiaries (frequently their spouses) with important protections for the pension assets, such as funding and vesting requirements. See 29 U.S.C. 1051-1061, 1081-1086. Spouses of participants received assurances, previously lacking in the law, that they would actually receive at least some part of the pension benefits that the participants had earned during a lifetime of employment. It would be highly ironic if ERISA, designed to assure that employees and their dependents would actually be able to enjoy their benefits for retirement purposes, were held to constitute a taking of their property, when that property

was significantly less protected before ERISA's enactment.[9]

In addition, when ERISA was first enacted, it provided that any pension plan that paid benefits to a participant in the form of an annuity was also required to offer that benefit in the form of a joint and survivor annuity, with the participant's surviving spouse as the beneficiary of the survivor annuity. See 29 U.S.C. 1055(a) (1976); Pub. L. No. 93-406, § 205(a), 88 Stat. 862. Congress was concerned about the "hardship where an individual primarily dependent on his pension as a source of retirement income is unable to make adequate provision for his spouse's retirement years should he predecease her. To correct this situation, [Congress required] that if a plan provides for a lifetime annuity then * * * the plan must provide for a joint and survivor annuity." H.R. Rep. No. 807, 93d Cong., 2d Sess. 67 (1974); see also H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 279 (1974). Thus, under ERISA as originally enacted, Dorothy Boggs obtained a contingent right to a survivor annuity under her husband's pension plan, payable for life, if she survived him and if Isaac Boggs did not elect a different form of benefits.[10]

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[9] Community property law may, in certain circumstances, give a spouse the right to prevent alienation of community property by the other spouse. But see La. Civ. Code Ann. art. 2346 (West 1985) (providing that either spouse may dispose of community property). Even if we assume, arguendo, that Louisiana community property law would have enabled Dorothy Boggs to prevent Isaac Boggs from alienating his pension benefits, ERISA clearly did not "take" that interest from Dorothy Boggs. To the contrary, ERISA strengthened that interest by strictly prohibiting *any* assignment or alienation of benefits under an ERISA plan. See U.S. Br. 12; 29 U.S.C. 1056(d)(1); 26 U.S.C. 401(a)(13).

[10] ERISA's protections for surviving spouses were substantially strengthened by Congress in the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426. Although ERISA, as originally enacted, provided that any pension plan that paid annuity benefits had

* * * * *

For the foregoing reasons, a construction of ERISA as superseding a nonparticipant spouse's state-law community property interest in the participant's pension as that interest might have existed before ERISA's enactment raises no constitutional difficulty under the Just Compensation Clause of the Fifth Amendment.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

JANUARY 1997

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to provide for a joint and survivor annuity, Congress concluded that the protection for surviving spouses was less than optimal in three respects. First, as originally enacted, ERISA did not require that a participant be paid benefits in the form of an annuity; therefore, if the participant did not receive benefits in the form of an annuity, neither would the surviving spouse. The REA provided for all defined benefit plans, and most defined contribution plans, to offer a joint and survivor annuity to the participant and spouse. See U.S. Br. 12-13; 29 U.S.C. 1055(a). Second, under ERISA as originally enacted, a participant could elect not to receive the joint and survivor annuity benefit, but to receive benefits in some other form (including a lifetime annuity for himself only). See 29 U.S.C. 1055(e) (1976). Under the REA, the spouse cannot be deprived, without her express written consent, of her right to the survivor annuity benefit or to the balance of an individual account plan, when the participant dies before retirement. See U.S. Br. 13; 29 U.S.C. 1055(c)(2). Third, the REA made special provisions for both annuities and distributions to surviving spouses of participants who die before retiring but while fully vested. U.S. Br. 13; 29 U.S.C. 1055(a)(2).